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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. _____

O. L. GRAGG, *Appellant,*

v.

CAYUGA INDEPENDENT SCHOOL DISTRICT,
Appellee.

On Appeal From The Supreme Court Of Texas

JURISDICTIONAL STATEMENT

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SUBJECT INDEX

	Page
The Opinions Below	1
Statement of the Grounds on Which the Jurisdiction of This Court is Invoked	2
Questions Presented by the Appeal	4
Statement of the Facts of the Case	4
The Federal Question Presented is Substantial	11
Conclusion	18
Appendices:	
Appendix A (Tex. Const. art. VIII, §1-d)	A-1
Appendix B (Opinion of Court of Civil Appeals, Twelfth Supreme Judicial District of Texas)	B-1
Appendix C (Opinion of the Supreme Court of Texas)	C-1
Appendix D Orders of the Supreme Court of Texas:	
D-1 Order granting motion of appellant for rehearing on his motion for writ of error, and setting aside previous order denying said writ.	D-1-1
D-2 Judgment of Supreme Court of Texas.	D-2-1
D-3 Order denying motion of appellant for rehearing on Judgment of the Supreme Court of Texas...	D-3-1
D-4 Notice of appeal to the Supreme Court of the United States, and proof of service thereon.	D-4-1
D-5 Order granting appeal to the Supreme Court of the United States and staying mandate to November 1, 1976.	D-5-1
Appendix E (Opinion of the Attorney General of the State of Texas)	E-1
Appendix F (U. S. Bureau of Census, Census of Agriculture, 1964, Vol. II, Statistics by Subjects—Chapter 8, Color, Race, and Tenure of Farm Operator, Table 25 (Reproduced in part)).	F-2
Appendix G (U. S. Bureau of Census, Census of Agriculture, 1969, Vol. II, General Report, Chapter 1, General Information; Procedures for Collection, Processing, Classification (Graph therefrom)).	G-2
Appendix H (U. S. Bureau of Census, Census of Agriculture, 1969, Vol. V, Special Reports, Part 11, Farm Finance (Tables 17 and 21)).	H-2

LIST OF AUTHORITIES

CASES

Page

Air-Way Electric Appliance Corporation v. Day, 266 U.S. 71, 69 L.Ed. 169 (1924) 13
Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 9 L.Ed.2d 584 (1963) 12
Dahnke-Walker Milling Company v. Bondurant, 257 U.S. 282, 66 L.Ed. 239 (1921) 3
Industrial Refrigerator Equipment Company v. State Tax Commission, 408 P.2d 937 (Or. 1965) 8
Klitgaard v. Gaines, 479 S.W.2d 765 (Tex. Civ. App.—Austin, 1972, writ ref'd n.r.e.) 7
Phillips Chemical Company v. Dumas Independent School District, 361 U.S. 376, 4 L.Ed.2d 384 (1960) 13
Royster Guano Company v. Virginia, 253 U.S. 412, 64 L.Ed. 989 (1920) 13
San Marcos Consolidated School District v. Nance, 495 S.W.2d 335 (Ct. Civ. App.—Austin, 1973, writ ref'd. n.r.e. 502 S.W.2d 694) 7
Schlesinger v. Wisconsin, 270 U.S. 230, 70 L.Ed. 557 (1926) 13
Senior v. Braden, 295 U.S. 422, 79 L.Ed 1520 (1935) 3, 12
Torasco v. Watkins, 367 U.S. 488, 6 L.Ed. 982 (1961) .. 3
United Fuel Gas Company v. Hallanan, 257 U.S. 277, 66 L.Ed. 234 (1921) 3
Wheeling Steel Corporation v. Glander, 337 U.S. 562, 93 L.Ed. 1544 (1949) 13

UNITED STATES STATUTES

28 U.S.C., Section 1257(2) 3

TEXAS CONSTITUTION

Article VIII, §1-d 2, 3, 5, 6, 7, 8, 9

TEXAS STATUTES

Tex. Rev. Civ. Stat. 6132b §26 7

OTHER STATE STATUTES

Alaska Stat. §29.53.035 (Supp. 1974) 12
Del. Code Ann. tits. 8-9, §8329 (Supp. 1975) 12
Fla. Stat. §193.461 (Supp. 1976) 13
Iowa Code §441.21 (Supp. 1976) 13
Mass. Gen. Laws Ann. ch. 61A §10 (Supp. 1976) 12
Va. Code Ann. §58-769.4 (Repl. Vol. 1974) 11
Wyo. Stat. Ann. §39-82 (Cum. Supp. 1975) 13

Page

TEXAS RULES OF CIVIL PROCEDURE

Rule 515 3

MISCELLANEOUS

13 U. of Fla.L.Rev. 479 (1960), WERSHAW, *Agricultural Zoning in Florida—Its Implications and Problems* 11
8 Harvard J. Leg. 158 (1970), *Property Taxation of Agriculture and Open Space Land* 11
4 Memphis St.L.R. 127 (1973), *Ad Valorem Taxation of Agricultural Land in Tennessee* 11
Webster's Third New International Dictionary (1967) 8

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JURISDICTIONAL STATEMENT

THE OPINIONS BELOW

There are two written opinions from the Court below:

The first was rendered by the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas, and is reported at 525 S.W.2d 32 and appears herein as Appendix B.

The second was rendered by the Supreme Court of Texas and has not yet been reported. A copy of such decision appears herein as Appendix C.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) This is an ad valorem tax case, which is on appeal from the Supreme Court of Texas. Specifically, it concerns Article VIII,§1-d of the Texas Constitution, which permits agricultural land to be valued for ad valorem tax purposes on its value for agricultural use, rather than on its market value. Among the criteria for determining what constitutes "agricultural use" is one which prima faciely requires the owner of the land to have more income from agriculture than from any one non-agricultural business. The Honorable Supreme Court of Texas has so applied the article as to constitute this single criterion a sine qua non for eligibility under the article without regard to the actual use of the land or the fact that its agricultural utilization is a bona fide business venture for profit by its owner. The facts of this case establish that appellant is a bona fide agriculturist, and that the land in question is used as a large and bona fide ranch.

Appellant contends that to segment bona fide agriculturists into two groups distinguished only by the amount of non-agriculturist income they enjoy in order to determine whether or not an individual is a bona fide agriculturist or to determine that his land is used for agricultural purposes, is not reasonable and is arbitrary, and that such classification can rest upon no grounds of difference having a fair and substantial relation to the object of the legislation. Based upon this contention appellant further claims that the article so applied is repugnant to the Fourteenth Amendment to the Constitution of the United States, and constitutes a denial of due process of law, and equal protection of the law thereunder. The decision of the Court of Civil

Appeals and of the Supreme Court of Texas was in favor of the validity of art. VIII,§1-d.

(ii) The Supreme Court of Texas rendered judgment in this cause on the 16th day of June, 1976, (Appendix D-2) by rendering a written opinion therein. Motion for rehearing was filed on the 30th day of June, 1976, and overruled without further opinion on the 21st day of July, 1976,[1] (Appendix D-3), from which action notice of appeal to the Supreme Court of the United States was filed with the Supreme Court of Texas on the 26th day of July, 1976. (Appendix D-4). Issuance of mandate has been ordered withheld until November 1, 1976, pending appeal to the United States Supreme Court (Appendix D-5).

(iii) Jurisdiction of this appeal is conferred on this court by Title 28 of the United States Code, §1257 (2).

(iv) Cases sustaining the jurisdiction of the court are:

Torasco v. Watkins, 367 U.S. 488, 6 L.Ed. 982 (1961).

Senior v. Braden, 295 U.S. 422, 79 L.Ed. 1520 (1935).

Dahnke-Walker Milling Company v. Bondurant, 257 U.S. 282, 66 L.Ed. 239 (1921).

United Fuel Gas Company v. Hallanan, 257 U.S. 277, 66 L.Ed. 234 (1921)

(v) The section of the Texas Constitution here involved, art. VIII, §1-d, is reproduced in its entirety in

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1. Under Texas practice motions for hearing may be filed within fifteen days of judgment. Tex.R.Civ.P. 515.

Appendix A hereof. This controversy, however, is limited to Subsection (a) thereof, which reads in its entirety:

> All land owned by natural persons which is designated for agricultural use in accordance with the provisions of this Section shall be assessed for all tax purposes on the consideration of only those factors relative to such agricultural use. "Agricultural use" means the raising of livestock or growing of crops, fruit, flowers, and other products of the soil under natural conditions as a business venture for profit, *which business is the primary occupation and source of income of the owner.* (emphasis added).

QUESTIONS PRESENTED BY THE APPEAL

Where the state constitution provides for determining the ad valorem tax value of agricultural land by a method different from that used in determining the value of other property may the definition of agricultural land, and the determination of whether or not the owner thereof is a bona fide agriculturist, be made dependent upon the amount of non-agricultural income the possessor of said land enjoys, without regard to the actual use of said land, or the fact that such possessor is admittedly in fact one engaged in the bona fide agricultural business, without being violative or repugnant to the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE FACTS OF THE CASE

At trial the undisputed testimony established that: appellant was an individual seventy-two years of age at such time. His first job as a young man was gathering cattle, and he has been in some way connected with farming or ranching virtually all of his life. He now owns

and operates 6 or 7 ranches totalling 22,000-25,000 acres of land (S.F. 109), approximately 7400 to 7500 acres (S.F. 106) of this is within the boundaries of appellee. He also is a minority partner in two oil producing partnerships, owns individual oil interest, and enjoys income from stock dividends of publicly held corporations, certificates of deposit, and rent. He spends a predominant portion of his time seeing to his extensive ranching endeavors. Appellee concedes that appellant is a bona fide rancher or agriculturist.[2]

Appellant applied to have his land within the jurisdiction of the Cayuga Independent School District, appellee herein, taxed on its agricultural use value, pursuant to the Texas Constitution, art. VIII, §1-d, *supra.* The years here in controversy are 1971, 1972, and 1973. Appellee examined the income of appellant for the year 1970 (to determine eligibility of appellant for the ad valorem tax year 1971), 1971 (to determine eligibility for 1972), and 1972 (to determine eligibility for 1973), in an effort to ascertain what income of appellant was "primary" even though there was no dispute that appellant was a bona fide agriculturist and that the land in question was actively utilized as a working ranch.

Appellee denied the claim by appellant for eligibility, because he did not prove that his agricultural income exceeded his non-agricultural income (S.F. 52-53). Appellee then valued the land of appellant on its market value, as is elsewhere provided in the Texas Constitution. Appellant did not question the accuracy of the market value of the land as determined by the Board of Equalization, but

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2. This fact would appear unquestionable under the evidence, and was expressly acknowledged by appellee in his Answer to Application for Writ of Error, at 33.

declined to pay said taxes on the ground that the tax assessor-collector (who was charged with the duty of determining eligibility)[3] had in effect made a mistake of law and misinterpreted the criteria for eligibility, and that appellant had a right to have the Board determine the value of the land based on its agricultural use.

Appellee brought suit against appellant which he defended on several grounds of state law including specific interpretations of art. VIII, §1-d, that eligibility thereunder was not dependent upon an income balancing test, but upon whether or not one was engaged in a bona fide effort to earn a profit from the land by agricultural operations. Appellant additionally brought into question the validity of any application of said art. VIII, §1-d that would make eligibility of an admitted bona fide agriculturist dependent upon non-agricultural income, as being violative of the Fourteenth Amendment to the Constitution of the United States, and expressly requested four findings of law by the trial court that art. VIII, §1-d of the Texas Constitution as applied was violative of the Constitution of the United States. Such requests were predicated on the claim that to make non-agricultural income a requisite for eligibility was violative of said Fourteenth Amendment, (Transcript of Record, Request for Additional and/or Amended Findings of Fact and Conclusions of Law [part II Conclusions of Law]), which request was denied (Transcript of Record, Order Refusing Defendant's Request for Additional and/or Amended Findings of Fact and Conclusions of Law). The contention of appellant was not academic nor in anywise theoretical. The application of which he was complaining was the precise application that was effectuated.

3. TEX.CONST. art VIII, §1-d (c).

Appeal was duly perfected to the Court of Civil Appeals of the Twelfth Supreme Judicial District of Texas. Again, both state and federal grounds were urged. Exception was taken to the failure of the trial court to grant the above referred to requests by appellant in Points of Error Fifty-one and Fifty-two. Such points are briefed in Brief of Appellant in the Court of Civil Appeals, 37-40. It is believed that a brief resumé of all principal points will facilitate a clearer understanding of the case. Appellant urged, *inter alia,* the following:

A. Should an income balancing test be employed that:

1. The word "income" used in said article referred to "gross income" not "net income" as claimed by appellee, and that there was a distinction between the gross income of appellant and the gross income of the partnership of which he was a member.[4]

   The court did not comment on the contention relative to the Uniform Partnership Act, but clearly attributed the gross income of the partnership itself to appellant.

2. Only business income was to be balanced against agricultural income.[5]

4. The former contention was based on San Marcos Consolidated School District v. Nance, 495 S.W.2d 335, (Ct. Civ. App.—Austin, 1973, writ ref'd. n.r.e. 502 S.W.2d 694), which itself was concerned with the application of the Texas Agricultural Use enactment; the latter upon the "entity theory" of the Uniform Partnership Act, which had been adopted in Texas, (Tex. Rev. Civ. Stat. 6132b), and specifically §26 thereof which states that a partner's interest in such an association was in the "profits" thereof.

5. This contention was based upon a reading of said art. VIII, §1-d, and two cases decided by the court, namely, the *San Marcos* case, *supra,* note 4, and Klitgaard v. Gaines, 479 S.W.2d 765 (Tex. Civ. App.—Austin, 1972, writ ref'd n.r.e.)

The court did not delve into whether or not non-business income should enter into the balancing test, but in effect decided that the quantity of appellant's alleged non-business income was so great that ipso facto it must constitute a business.

3. The word "primary" used in said article was not a synonym for the word "majority," but meant merely the single largest of several, and accordingly the taxpayer was not required to balance his entire non-agricultural business income against his agricultural income, but merely balance such agricultural income against each individual source of non-agricultural business income.[6]

The Court of Civil Appeals did not comment on this contention.

B. Although a literal reading of art. VIII, §1-d would yield the results suggested above, and appellant would qualify thereunder, to so apply said article would constitute an arbitrary classification that would not be reasonable and would have no fair and substantial relation to the object of the legislation, and accordingly would be violative of the Fourteenth Amendment to the Constitution of the United States. Appellant further pointed out that under state law it had already been held that in applying said article it was not required to accumulate agricultural income on one side and balance it against

6. Citing, *inter alia*, Webster's Third New International Dictionary (1967), and Industrial Refrigerator Equipment Company v. State Tax Commission, 408 P.2d 937 (Or. 1965).

the non-agricultural income on the other side, "but rather to qualify under the amendment one must be engaged in a bona fide effort to earn a profit from the land by agricultural operations;"[7] and that a ruling by the Attorney General of Texas to the effect that art. VIII, §1-d was not violative of the Constitution of the United States was expressly premised upon the assumption that an income balancing test was *not* required.[8]

The Court of Civil Appeals did not comment upon the constitutional question raised by appellant.

Each of the aformentioned points was raised in the application by appellant for writ of error to the Supreme Court of Texas. The federal question herein was the subject of the Ninth Point of Error, thereof, and was thoroughly briefed. Petitioner's Application for Writ of Error in the Supreme Court of Texas, at 33-41. Said court at first denied such writ of error, but reversed itself on motion by appellant for rehearing, (Appendix D-1). In the motion for rehearing appellant specifically urged that "art. VIII,§1-d of the Texas Constitution, as applied, is repugnant to the Fourteenth Amendment to the Constitution of the United States." Petitioner's Motion for Rehearing on Application for Writ of Error, at 6. In the opinion which followed, the court made substantial modifications in the opinion of the Court of Civil Appeals. The principal modifications by the court dealt with the finding that the word "income" meant, as appellant had contended, "gross income" not "net

7. *San Marcos v. Nance, supra,* note 4; and *Klitgaard v. Gaines, supra,* note 5.

8. Tex. Atty Gen. Op. No. M-1271 (1972), Appendix E.

income." It further found, as appellant had urged, that the word "primary" was not a synonym for the word "majority" but meant merely the single largest of several. It additionally agreed that only business income was to be considered, but held appellant had an affirmative duty to prove his interest, dividends, etc., were not business related, which it was ruled he failed to do.

The court apparently disagreed with appellant in two principal areas. The second of these is the only one before this court. First, although not commenting on the Uniform Partnership Act, it failed to recognize the "entity theory" espoused by such act, in that it attributed appellant's portion of partnership gross income to him prior to distribution.

Secondly, the court held in favor of the constitutionality of the act in face of the claim by appellant that the act as applied was violative and repugnant to the Fourteenth Amendment to the Constitution of the United States, and denied appellant due process of law, and the equal protection of the law thereunder. The Supreme Court of Texas entered judgment for appellee on the 30th day of June, 1976. Appellant then filed his motion for rehearing with said court, wherein he pointed out that the constitutional impediment of which appellant had consistently complained still remained, which was overuled on the 26th day of July, 1976.

The constitutional impediment is that under the article as applied, two individuals situated in precisely the same way in their agricultural activities are subject to different assessments, due to reasons completely extraneous to their agricultural activity.

Although not dependent on such fact, it is to be emphasized that the position of appellant is in nowise atypical. Indeed, as census figures will show, the repugnancy of which complaint is made adversely affects from one-third to two-thirds of the agriculturists in the State of Texas. The right to be vindicated is therefore not that of appellant alone.

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

By 1973 there were 21 states that had some type of agricultural use enactment for valuing agricultural land.[9] The number now has increased to at least 32.[10] The rapid growth of legislation limiting the evaluation of agricultural land to its use for such purposes evidences a national condition common to agriculturists throughout the country, and a growing recognition that the public interest in the maintenance of farm land is in jeopardy of compromise due to the diversity of market value and the earning capacity—i.e., the agricultural yield—of land. The agricultural use enactments have accordingly been established to ameliorate those pressures which would force the conversion of such agricultural land to more intensive uses which pressures include, at least in part, the assessment of such agricultural land at values incompatible with such agricultural yield.[11] The purposes stated are deemed to en-

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9. Recent legislation—*Ad Valorem Taxation of Agricultural Land in Tennessee*, 4 Memphis St.L.R. 127 (1973).

10. See Opinion of Supreme Court of Texas, Appendix C.

11. 4 Memphis St.L.R. 127, *supra*, note 9; *Property Taxation of Agriculture and Open Space Land*, 8 Harvard J. Leg. 158 (1970); WERSHAW, *Agricultural Zoning in Florida—Its Implications and Problems*, 13 U. of Fla.L.Rev. 479 (1960); Va. Code Ann. §58-769.4 (Repl. Vol. 1974).

compass and be compatible with the purposes of the Texas enactment as acknowledged by the Supreme Court of Texas to the extent that such acknowledgement is deemed to speak to the enactment as a whole.

There can be little doubt that the purposes pronounced by the Texas Supreme Court, when speaking to art. VIII, §1-d as a whole, and those more broadly defined above, form the bases of a valid classification for differentiating between agricultural land and other property. More, however, than the mere ascertainment of a valid or salutory legislative purpose is required. It is established that the court will look through mere expressions of legislative purposes, *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 9 L.Ed.2d 584, (1963), and will determine the true nature of the matter itself; *Senior v. Braden,* 295 U.S. 422, 79 L.Ed. 1520, (1935), *supra.*

In seeking to ameliorate the pressures on agriculture by affording a different method of valuing agricultural land, Texas is unique. Alaska appears to be the only other state that demands a comparison of farm income with off-farm income in setting standards for the determination of bona fide agricultural use.[12] Even the Alaskan enactment cannot be deemed comparable to that of Texas, for it requires that only 10% of one's gross income be from agricultural endeavors, and even then there are special exculpatory provisions in the event of crop failure, etc. Frequently the requirements are nominal, Delaware and Massachusetts require that only five acres be devoted to agriculture, plus a gross income of $500.[13] Florida, Iowa and Wyoming are among the states requiring basically

12. Alaska Stat. §29.53.035 (Supp. 1974).

13. Del. Code Ann. tits. 8-9, §8329 (Supp. 1975); Mass. Gen. Laws Ann. ch. 61A §10 (Supp. 1976).

that the land (in the case of Iowa at least 10 acres) merely be used for agricultural purposes.[14]

A state has great latitude in formulating its policies and in the classification of its taxpayers, "but the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." *Royster Guano Company v. Virginia,* 253 U.S. 412, 64 L.Ed. 989 (1920), and, " . . . *mere* difference is not enough: the attempted classification must always rest upon the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis [i.e., without substantial relation to the object of the legislation]." (emphasis that of the court). The doctrine expressed has wide support. *Phillips Chemical Company v. Dumas Independent School District,* 361 *U.S.* 376, 4 L.Ed.2d 384 (1960); *Wheeling Steel Corporation v. Glander,* 337 U.S. 562, 93 L.Ed. 1544 (1949); *Schlesinger v. Wisconsin,* 270 U.S. 230, 70 L.Ed. 557 (1926); *Air-way Electric Appliance Corporation v. Day,* 266 U.S. 71, 69 L.Ed. 169 (1924).

It is true, of course, that those whose income is primarily from agriculture would normally, probably even prima faciely, be bona fide agriculturists. It is also quite obvious that the bona fide agriculturist class is much broader than this, and that the source and amount of non-agricultural income enjoyed by the possessor of land has nothing whatsoever to do with the question of whether or not such land is employed in "agricultural use," or whether he is a bona fide agriculturist.

14. Fla. Stat. §193.461 (Supp. 1976); Iowa Code §441.21 (Supp. 1976); Wyo. Stat. Ann. §39-82 (Cum. Supp. 1975).

The arbitrary and unreasonable nature of the Texas Agricultural use provision when applied as in the instant case is even more apparent when we reflect that:

1. It discriminates against the less successful agriculturist with other business interests, without regard to whether such lack of success is due to acts of God, depressed market conditions, or plain ineptness.
2. It discriminates against the taxpayer who is engaged in the agricultural business, but has been particularly successful in other business.
3. It makes the taxability of assets in one business (i.e., the agricultural business) dependent upon elements completely extraneous to that business.

The unreasonable and arbitrary attributes of the Texas Agricultural Use enactment are substantial within the meaning of the authority just cited, but their impact is much broader than any pertinent authority on the arbitrary classification of taxpayers that appellant has been able to find, in that such an application will arbitrarily classify a substantial portion of the entire agricultural community of the State of Texas. The palpably arbitrary nature of the application and the breadth of its impact each establishes the fact that the question is so substantial as to require the plenary consideration of this honorable tribunal.

The constituency of the agricultural community emphasizes that the application is both unreasonable, arbitrary, and even capricious under the interpretation made by the honorable court below. The 1964 census of agriculture reveals that at the approximate time of the enact-

ment of the Texas Agricultural Use provision (1966) there were a total of 3,157,857 farms in the United States.[15] Such census termed 2,165,712 of these as "commercial."[16]

The agricultural use tax, being a property or ad valorem tax, is ultimately borne by the owner of the land. The 1964 census further reveals that there were a total of 1,019,749 owner operators of said commercial farms and an additional 676,285 part owners operating such farms.[17] Said census additionally shows 247,353 such full owners (24.3%), and 72,104 (10.7%) of such part owners,[18] and their households.[19] Thus, 35% of those who bear the burden of the tax received more off-farm income, than

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15. U. S. Bureau of Census, Census of Agriculture, 1964 Vol. II, Statistics by Subject—Chap. 8, Color, Race, and Tenure of Operator, Table 25 (reproduced in part, Appendix F).

16. The term "commercial farm" is defined in the 1964 census to mean farms with sales of $2,500, or more, or less than such amount if the operator was under 65 years of age if he worked fewer than 100 days off his farm, *Id.* at 749. The term was dropped from the 1969 census. The term is useful, however, in referring to farms shown in various tables, etc., and is employed in this statement as a convenience to designate farms shown as having sales of $2,500 or more.

17. The census data appears so compiled that there is only a single tenure (e.g., owner, part owner, crop share tenant, etc.,) per farm.

18. Census of Agriculture, 1964, *supra* note 15, at 796 (reproduced in Appendix F).

19. Although the term "household" is somewhat broader than the term "owner or part owner" it would not appear to materially distort the general conclusion that significant amounts of off-farm income were being received by a material number of farm owners. Any possible inference to the contrary is further mitigated under the Texas system of community property where one-half the earning of each spouse is attributed to the other, even should the property itself not be held by the community estate.

farm income, and would be disqualified on the "income test" alone.

The more recent statistics evidence a similar trend. The 1969 census of agriculture, (the most recent general agricultural census to be published) does not inform us as to the number of agriculturists receiving more off-farm income than income from farm sales, but the figures which are available are, nevertheless, pertinent. Fifty-one cents of each dollar received by farm operators with sales of less than $20,000 is from off-farm income.[20] Eighty-two percent of farm operators and members of their families enjoy some off-farm income.[21]

Strikingly, 37.8% of the farms are less than Class 5[22] —i.e., they have sales of less than $2,500, but account for only 2.2% of all agricultural sales. At the other end of the spectrum Classes 1a and 1b farms constitute only 8.1% of the farms, but account for 55.9% of the sales.

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20. U. S. Dept. of Agriculture—*Agricultural Outlook* (July 1975), partially reproduced in Post Submission Brief of Appellant in the Supreme Court of Texas.

21. U. S. Bureau of Census, Census of Agriculture, 1969, [hereinafter Census of Agriculture, 1969] Vol. V Special Reports, Part 11 Farm Finance, at 13 (tables 17 and 21 of this report are reproduced in Appendix H due to their relevance to the over all status of off-farm receipts).

22. One of the most frequent classifications currently being utilized by the Bureau of Census in their reports appears to be:
Class 0 $100,000 or more in sales; Class 1 $40,000 to $99,999; Class 2 $20,000 to $39,999; Class 3 $10,000 to $19,999; Class 4 $5,000 to $9,999; Class 5 $2,500 to $4,999; Class 6, and part time, and part retirement, which have special definitional pecularities not here relevant, but each have in common sales of $50 to $2,499. Census of Agriculture, 1969, Vol. V Special Reports, Part 11, Farm Finance, at 10. Certain other reports designate Class 0 and Class 1 as 1a and 1b, respectively, (e.g. Census of Agriculture, 1969, Vol. II, Chap. 3, Farm Management, Farm operators).

(Appendix G).[23] From the figures given it may be calculated that two-thirds of the farms in the "commercial" category have sales of less than $20,000.

A comparison of farm sales to off-farm income reveals that the percentage of off-farm income decreases as farm sales increase, but nevertheless off-farm income is significant to all economic classes. (Appendix H, Table 17).[24]

No conditions are perceived which would justify distinguishing between the larger agriculturists, say those with sales in excess of $20,000, who account for some 76.3% of all sales, and those with less than $20,000 in sales, who constitute 79.7% of the total farm population. In any event, such a diachotomy is not achieved by looking to the non-farm income of those who own and operate farm land. Even though the ratio of off-farm income to farm income increases as farm sales decline, there are undoubtedly a significant number in all farm sale classes who enjoy more off-farm income than from farm sales. This conclusion is in no way impugned if adjustments are made for "commercial" farms. The significant fact is that irrespective of how one groups our agriculturists nothing is revealed in its constituency to suggest that differences in non-farm incomes constitute a difference having any fair and substantial relation to the objects of the Texas Agricultural enactment.

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23. *Id.* Vol. II, Chap. 1, General Information, Procedures for Collection, Processing, Classification.

24. *Id.* Vol. V, Part 11, Farm Finance. Wages are by far the most important single source of non-farm income. Non-farm business and professions are also quite important. (Appendix H, Table 21).

CONCLUSION

The taxing scheme of which complaint is made is one under which eligibility may vary from year to year, depending upon the vagaries of nature, or other fortuitous conditions. Furthermore, it is clear that non-agricultural income has no relation to whether or not the operator thereof is a bona fide agriculturist, or whether or not land is put to "agricultural use".

An enactment so capricious is violative of all standards of reasonableness, and is arbitrary. Such facts are sufficiently patent to have merited a formal opinion by the Attorney General of Texas. The impact of such arbitrariness is extraordinarily broad, touching a substantial portion of all agriculturists within the State of Texas. The facts recited and reasons given are sufficiently substantial as to require plenary consideration for their resolution.

Respectfully submitted,

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October, 1976

APPENDICES

APPENDIX A

TEX. CONST. art. VIII, §1-d

§ 1-d. Assessment of lands designated for agricultural use.

Sec. 1-d. (a) All land owned by natural persons which is designated for agricultural use in accordance with the provisions of this Section shall be assessed for all tax purposes on the consideration of only those factors relative to such agricultural use. "Agricultural use" means the raising of livestock or growing of crops, fruit, flowers, and other products of the soil under natural conditions as a business venture for profit, which business is the primary occupation and source of income of the owner.

(b) For each assessment year the owner wishes to qualify his land under provisions of this Section as designated for agricultural use he shall file with the local tax assessor a sworn statement in writing describing the use to which the land is devoted.

(c) Upon receipt of the sworn statement in writing the local tax assessor shall determine whether or not such land qualifies for the designation as to agricultral use as defined herein and in the event it so qualifies he shall designate such land as being for agricultural use and assess the land accordingly.

(d) Such local tax assessor may inspect the land and require such evidence of use and source of income as may be necessary or useful in determining whether or not the agricultural use provision of this article applies.

(e) No land may qualify for the designation provided for in this Act unless for at least three (3) successive

years immediately preceding the assessment date the land has been devoted exclusively for agricultural use, or unless the land has been continuously developed for agriculture during such time.

(f) Each year during which the land is designated for agricultural use, the local tax assessor shall note on his records the valuation which would have been made had the land not qualified for such designation under this Section. If designated land is subsequently diverted to a purpose other than that of agricultural use, or is sold, the land shall be subject to additional tax. The additional tax shall equal the difference between taxes paid or payable, hereunder, and the amount of tax payable for the preceding three years had the land been otherwise assessed. Until paid, there shall be a lien for additional taxes and interest on land assessed under the provisions of this Section.

(g) The valuation and assessment of any minerals or subsurface rights to minerals shall not come within the provisions of this Section.

Adopted Nov. 8, 1966.

APPENDIX B

OPINION OF COURT OF CIVIL APPEALS
TWELFTH SUPREME JUDICIAL DISTRICT OF
THE STATE OF TEXAS

OSCAR LEE GRAGG, *Appellant,*

v.

CAYUGA INDEPENDENT SCHOOL DISTRICT,
Appellee.

NO. 820.

Court Of Civil Appeals Of Texas
Tyler.

June 5, 1975.

Rehearing Denied June 26, 1975.

Independent school district instituted suit against landowner for recovery of delinquent ad valorem taxes and to foreclose tax lien on land lying within school district. The 3rd Judicial District Court, Anderson County, Jack H. Holland, J., entered judgment for district and defendant appealed. The Court of Civil Appeals, Moore, J., held that defendant did not discharge his burden of proving that he was within requirements of constitutional provision that land designated for agricultural use be assessed for tax purposes on basis of only those factors relative to agricultural use; that where defendant was actively

engaged in oil business and in business of making investments, trial court properly considered income from such in arriving at defendant's income from nonagricultural sources for determining his eligibility for agricultural use designation, and that testimony of taxpayer's landman that, after talking with landowners, he had "learned" that, in other school districts where land was assessed as agricultural land, a taxpayer received "about" a "40 percent reduction" in his taxes was clearly hearsay and as such was without probative force to show substantial injury to taxpayer.

Affirmed.

* * *

Billy H. Gragg, Bob R. Reeves, Palestine, for appellant.

James E. Pritchard, Fort Worth, for appellee.

MOORE, Justice.

This is a delinquent tax suit. Appellee, Cayuga Independent School District, instituted suit against appellant, O. L. Gragg, for the recovery of certain delinquent ad valorem taxes alleged to be due by appellant for the years of 1971, 1972 and 1973, and to foreclose a tax lien on land owned by appellant lying within the school district. Appellant answered with a general denial and affirmatively alleged by way of a defense that no taxes were due because the method used by the school district in assessing the land for taxes was in violation of Article 8, Sec. 1—d[1] of the Texas Constitution, Vernon's Ann.St., which requires that land designated for agricultural use must be assessed for tax purposes on the basis of only those

1. Hereinafter referred to as the "amendment."

factors relative to agricultural use.[2] After a trial before the court sitting without a jury, the trial court entered judgment for the school district for taxes, penalty and interest in the amount of $30,686.16 and for foreclosure of the tax lien. From such judgment, appellant, O. L. Gragg, perfected this appeal.

We affirm the judgment rendered by the trial court.

The trial court filed extensive findings of fact and conclusions of law. Among other things, the trial court found (1) that although appellant used the land for agricultural purposes, he failed to establish his eligibility for an agricultural use designation under the amendment in that his proof failed to show that his agricultural busi-

2. The relevant parts of the Constitutional Amendment are as follows:

"Sec. 1-d. Assessment of lands designated for agricultural use

"Sec. 1-d. (a) All land owned by natural persons which is designated for agricultural use in accordance with the provisions of this Section shall be assessed for all tax purposes on the consideration of only those factors relative to such agricultural use. 'Agricultural use' means the raising of livestock or growing of crops, fruit, flowers, and other products of the soil under natural conditions as a business venture for profit, which business is the primary occupation and source of income of the owner.

"(b) For each assessment year the owner wishes to qualify his land under provision of this Section as designated for agricultural use he shall file with the local tax assessor a sworn statement in writing describing the use to which the land is devoted.

"(c) Upon receipt of the sworn statement in writing the local tax assessor shall determine whether or not such land qualifies for the designation as to agricultural use as defined herein and in the event it so qualifies he shall designate such land as being for agricultural use and assess the land accordingly.

"(d) Such local tax assessor may inspect the land and require such evidence of use and source of income as may be necessary or useful in determining whether or not the agricultural use provision of this article applies."

ness constituted his primary occupation and source of income and (2) that appellant failed to prove that the plan or scheme employed by the district in fixing the value of his land worked to his substantial injury.

Appellant brings fifty-two points of error. Basically, he contends that the evidence conclusively established his eligibility to claim the benefit of the amendment, and based on this premise, he contends that the assessment and levy were void because the district adopted a fundamentally wrong method of taxation in that the school district valued his land on a basis other than its value for agricultural use in violation of the constitutional mandate. We are not in accord with this proposition for two reasons.

[1] First, in order for appellant to claim the benefits of the amendment, it was incumbent upon him to plead and prove that he properly brought himself within the requirements of the amendment. One of the essential requirements is that an applicant for an agricultural use designation must prove that his business venture in agriculture constitutes his primary occupation and source of income. Thus, the source of an applicant's income is of paramount importance. With regard to appellant's income, the trial court made findings of fact as to both the net and gross annual income received by appellant from his agricultural business as well as from other business and investments. For convenience, the findings are set forth in the following schedule:[3]

3. The parties agree that in determining eligibility for an agricultural use designation for 1971, 1972 and 1973, appellant's income for each preceding year is controlling.

	1970	1971	1972
Gross Income from Agricultural Operations	$370,659.07	$299,205.84	$301,616.24
Gross Income from Business Ventures, Occupations, and Investment of Capital Other than Agricultural Operations	415,295.28	400,670.11	674,659.17
Gross Income from All sources	788,719.05	703,003.17	980,856.31
Net Income from Agricultural Operations	131,357.14	79,397.67	109,188.64
Net Income from Business Ventures, Occupations, and Investment of Capital, other than Agricultural Operations	402,038.55	391,091.78	661,628.83
Net Income from All Sources	536,160.39	473,616.67	775,398.37

[2, 3] Appellant has no points of error challenging the accuracy of any of the findings showing appellant's income from the various sources indicated and therefore such findings are conclusive and binding on this Court. Curry v. E. E. Stone Lumber Co., 218 S.W.2d 293 (Tex. Civ. App., writ ref., n.r.e.); Cortez v. Cortez, 457 S.W.2d 131 (Tex. Civ. App. 1970, n.w.h.). In view of the foregoing findings, it becomes obvious that appellant's agricultural income did not constitute his primary source of income and this is true irrespective of whether his income is computed on the basis of net or gross income. We hold that the trial court did not err in finding that appellant did not discharge his burden of proving that he brought himself within the requirements of the amendment.

While appellant does not challenge the accuracy of the foregoing income schedule, he maintains that the trial court erred in including certain items of income in calculating his total business income which he received from a business venture for profit is to be compared with agriculating his total business income. He argues that only such income which he received from a business venture for profit is to be compared with agricultural income in determining his eligibility. He takes the position that the items of income listed below should not have been classified as business income and upon excluding these items, his agricultural income would then constitute his primary source of income thereby making him eligible for an agricultural use designation. The items of income which he claims should have been excluded are set forth in the following schedule:

	1970	1971	1972
Oil and Gas Working Interest Roy.	$ 5,888.59	$ 5,103.98	$ 4,367.76
Sale of Corporate Stock	111,430.85	62,288.21	301,258.03
Dividends	62,177.71	66,544.57	70,692.98
Rent-Houston office building		63,340.00	76,010.22
Interest-Savings Account	38,004.00	23,265.13	110,865.82
Interest-Project Notes	36,225.72		
TOTAL	$248,426.87	$220,541.86	$563,194.81

[4, 5] We are not in accord with appellant's contention that the foregoing items should have been excluded from his non-agricultural income. In determining whether agricultural income constitutes the primary source of income, other income from business ventures, occupations and investments must be considered. San Marcos Consolidated

Ind. School Dist. v. Nance, 495 S.W.2d 335 (Tex. Civ. App., 1973, writ ref'd., n.r.e.). In the instant case, there is nothing in the evidence showing that the above listed items of income were received by appellant as anything other than income from business ventures, occupations or investments of capital. The record reflects that appellant has been in the oil business for over forty years; he is a partner in two oil companies, Carter-Gragg Oil Company and Gragg Drilling Company; he has a considerable income from oil and gas producing properties located in a number of States; he has rental income from an office building in Houston; he received considerable income from invested capital such as profit on the purchase and sale of stock, and he receives dividends from stocks as well as interest on invested capital. He purchased the farm land in question in 1946. In view of the fact that appellant actively engaged in the oil business and actively engaged in the business of making investments, we think the trial court properly included the foregoing items in arriving at appellant's income from non-agricultural sources.

[6] Second, even if appellant had established his eligibility to an agricultural use designation, it does not necessarily follow that he would be entitled to a judgment voiding the assessment merely because the school district failed to assess his land in accordance with the constitutional mandate. There must be more than the adoption of a fundamentally wrong principle or method of taxation. When the attack is made because the taxing authority followed an arbitrary plan or scheme of fixing values, the taxpayer, to prevail, must show not only that the plan was an arbitrary and illegal one, but also that the use of the plan worked to his substantial injury. Druesdow v.

Baker, 229 S.W. 493, 495 (Tex. Com. App., 1921); Rowland v. City of Tyler, 5 S.W.2d 756, 760 (Tex. Com. App., 1928); Lubbock Hotel Co. v. Lubbock Independent School Dist., 85 S.W.2d 776 (Tex. Civ. App., Amarillo, 1935, no writ); State v. Whittenburg, 153 Tex. 205, 265 S.W.2d 569, 573 (1954); City of Arlington v. Cannon, 153 Tex. 566, 271 S.W.2d 414 (1954); Whelan v. State, 155 Tex. 14, 282 S.W.2d 378 (1955); Stein v. Lewisville Independent School Dist., 481 S.W.2d 436 (Tex. Civ. App., Ft. Worth, 1972, writ ref., n.r.e.). In Bass v. Aransas County Independent School District, 389 S.W.2d 165, 170 (Tex. Civ. App., Corpus Christi, 1965, writ ref., n.r.e.), the rule is stated thusly:

> "The rule has been definitely established in Texas that where an aggrieved taxpayer fails to avail himself of the affirmative remedies of injunction and mandamus to prevent a taxing authority from putting an invalid and arbitrary plan of taxation into effect, but waits until suit is brought against him for delinquent taxes, his right to relief is limited. Once such a plan is put into effect, in the absence of a showing, by comparison of the assessments against his property with assessments against other like property, of a gross discrimination against him, the land owner may defeat recovery of taxes only to the extent that they are excessive, and he must assume the burden of proving excessiveness. He must show that the use of such a plan worked to his substantial injury, and the extent of such injury. * * *"

In the City of Orange v. Levingston Shipbuilding Co., 258 F.2d 240 (5th Cir. 1958), the Court said:

> "No matter how much it (the tax plan) violates the State Constitutional pattern, the only relief of a taxpayer defending a delinquent tax suit is to show in dollars that he is worse off."

[7, 8] Upon the trial of the case at bar, the school district introduced into evidence the delinquent tax records for the years 1971, 1972 and 1973. The tax assessor identified the records and testified that the taxes had not been paid. This evidence made a prima facie case as to every material fact necessary to the establishment of appellee's cause of action to recover delinquent taxes. Article 7326 and Article 7328, Vernon's Annotated Tex. Civ. Stat.; Alamo Barge Lines, Inc. v. City of Houston, 453 S.W.2d 132 (Tex. Sup. 1970); B. M. Jamison v. City of Pearland, 489 S.W.2d 636 (Tex. Civ. App., Houston, 1st Dist., 1972, writ ref'd., n.r.e.). Once a taxing authority establishes a prima facie case, showing that taxes are delinquent, the burden then rests upon the taxpayer to go forward with proof which would meet the requirements of law for avoiding the assessment and levy. State v. Whittenburg, supra.

The record is devoid of any evidence showing that the taxes levied against appellant were either discriminatory or excessive. Appellant made no attempt to prove that the assessment and levy were discriminatory. His sole contention seems to be that the taxes are excessive because his land was assessed at a value in excess of the value at which it should have been assessed had it been assessed solely on factors relative to its agricultural use.

[9] Appellant, however, failed to offer any proof of the value of his land based solely on its use for agricultural purposes. The only proof of the value of the land was the assessed value set by the tax assessor. For all the record shows, it may well be that the assessed value was

actually lower than the market value of the land when valued on an agricultural use basis. In the absence of proof showing the assessment and levy to be excessive, it follows that appellant failed to discharge his burden of proving substantial injury.

[10] Appellant argues that his proof was sufficient to show substantial injury. He takes the position that substantial injury was conclusively established by the testimony of Walter B. Brown, appellant's landman. We do not agree. Brown testified that after talking with landowners, he had "learned" that in other school districts where land was assessed as agricultural land, the taxpayer received "about" a "40% reduction" in his taxes. Such testimony is clearly hearsay and, as such, was without probative force. 24 Tex. Jur. 2d, Evidence, Sec. 557, p. 51. At any rate, such testimony would not meet appellant's burden of proving that the assessed value was in excess of the market value of his land when valued on an agricultural use basis.

By other points of error, appellant contends that various findings of fact made by the Court are against the great weight and preponderance of the evidence. After a review of the entire record and after weighing all the evidence, both that in favor of, as well as that against the findings complained of, we are of the opinion that such findings are not against the great weight and preponderance of the evidence.

Other points, not discussed herein, have been considered and found to be without merit and are overruled.

The judgment of the trial court is affirmed.

APPENDIX C

OPINION OF THE SUPREME COURT OF TEXAS

IN THE

SUPREME COURT OF TEXAS

NO. B-5444

O. L. GRAGG, Petitioner

v.

CAYUGA INDEPENDENT SCHOOL DISTRICT, Respondent

FROM ANDERSON COUNTY

TWELFTH DISTRICT

This is a suit by the school district to collect ad valorem taxes on ranch land owned by O. L. Gragg for the years 1971, 1972 and 1973. Mr. Gragg's defense is that the denial of an agricultural use designation for his land was contrary to law. The trial court rendered judgment in favor of the school district and the Court of Civil Appeals affirmed. 525 S.W.2d 32. We granted the writ to examine apparent differences between holdings in former cases and the manner in which the Court of Civil Appeals arrived at its judgment in this case. Although differing with its opinion in some respects, we arrive at the same result and affirm the judgment of the Court of Civil Appeals.

The special treatment of the assessment of agricultural lands for ad valorem tax valuation purposes, was effected by legislative resolution in 1965 and approved by popular vote in 1966. This self-enacting constitutional amendment is now Article 8, Sec. 1-d of the Texas Constitution.[1]

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1. The full text of Article 8, Sec. 1-d follows:

Sec. 1-d. (a) All land owned by natural persons which is designated for agricultural use in accordance with the provisions of this Section shall be assessed for all tax purposes on the consideration of only those factors relative to such agricultural use. "Agricultural use" means the raising of livestock or growing of crops, fruit, flowers, and other products of the soil under natural conditions as a business venture for profit, which business is the primary occupation and source of income of the owner.

(b) For each assessment year the owner wishes to qualify his land under provisions of this Section as designated for agricultural use he shall file with the local tax assessor a sworn statement in writing describing the use to which the land is devoted.

(c) Upon receipt of the sworn statement in writing the local tax assessor shall determine whether or not such land qualifies for the designation as to agricultural use as defined herein and in the event it so qualifies he shall designate such land as being for agricultural use and assess the land accordingly.

(d) Such local tax assessor may inspect the land and require such evidence of use and source of income as may be necessary or useful in determining whether or not the agricultural use provision of this article applies.

(e) No land may qualify for the designation provided for in this Act unless for at least three (3) successive years immediately preceding the assessment date the land has been devoted exclusively for agricultural use, or unless the land has been continuously developed for agriculture during such time.

(f) Each year during which the land is designated for agricultural use, the local tax assessor shall note on his records the valuation which would have been made had the land not qualified for such designation under this Section. If designated land is subsequently diverted to a purpose other than that of agricultural use, or is sold, the land shall be subject to an additional tax. The additional tax shall equal the difference between taxes paid or payable, hereunder, and the amount of tax payable for the preceding three years had the land been otherwise assessed. Until paid, there shall be a lien for additional taxes and interest on land assessed under the provisions of this Section.

The landowner, O. L. Gragg, is a highly successful businessman who resides in Anderson County. One of his several businesses, and the one to which he devotes most of his time, is a ranching operation covering over 22,000 acres of land. About one-third of his ranch land lies within Cayuga Independent School District. Mr. Gragg testified that he spent ten hours a day, seven days a week, in the ranching business. This was not disputed. The trial court found, however, that Mr. Gragg received more income, both gross and net, from other business ventures, occupations, and investments than from his ranching business. Thus, the question is the legal effect of the income he receives from his "eight or twelve other businesses." His sources of income in addition to agriculture include oil and gas operations (including personal working interests, a partnership oil company which he manages, and a partnership drilling company in the control of which he participates), oil and gas royalty, corporate stock sales and dividends, rent from an office building in Houston, and interest from notes and savings accounts.

The findings of the trial court with respect to the income of Mr. Gragg during each of the relevant preceding years were summarized by the Court of Civil Appeals in the following tables:

(g) The valuation and assessment of any minerals or subsurface rights to minerals shall not come within the provisions of this Section.

Gross Income

	1970	1971	1972
Gross Income from Agricultural Operations	$370,659.07	$299,205.84	$301,616.24
Gross Income from Business Ventures, Occupations, and Investment of Capital Other than Agricultural Operations	415,295.28*	400,670.11*	674,659.17*
Gross Income from All Sources	788,719.05	703,003.17	980,856.31

Net Income

Net Income from Agricultural Operations	$131,357.14	$ 79,397.67	$109,188.64
Net Income from Business Ventures, Occupations, and Investment of Capital, other than Agricultural Operations	402,038.55	391,091.78	661,628.83
Net Income from All Sources	536,160.39	473,616.67	775,398.37

* Items of partnership income from the oil business are reported here as "net" rather than "gross."

Petitioner Gragg did not challenge the substantial accuracy of the findings or the above summaries of his income from the various sources indicated. He does, however, complain of any use of "net" rather than "gross" income in comparing his ranch income with that from other sources. He also asserts error in balancing his agricultural income against the total income received from all other separate business enterprises in arriving at a determination of whether his ranching business is his "primary occupation and surce of income." His appeal presents three contentions which are contested by the

school district: (1) that the agricultural assessment provision refers to "gross" rather than "net" income; (2) that "primary" occupation and source of income does not require a majority (more than 50%) of ones income to be agricultural so long as it is more than the amount received from any one of several other businesses; and (3) that only other income from other business ventures or occupations should be considered in comparing sources of income — specifically that dividends and interest from investments should not be considered. Petitioner Gragg also presents constitutional questions which are conditioned upon our answers to one or more of the foregoing questions.

All of the above questions arise from the last phrase of the following sentence in Sec. 1-d(a):

> ". . . 'Agricultural use' means the raising of livestock or growing of crops, fruit, flowers, and other products of the soil under natural conditions as a business venture for profit, *which business is the primary occupation and source of income of the owner.*" (Emphasis added.)

Background and Purpose

The questions can be considered in proper context and perspective by first examining the background and purpose of the constitutional amendment which created the special agricultural use assessment for land "owned by natural persons which is designated for agricultural use . . . ."[2]

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2. The Texas Legislative Council published an analysis of the proposed amendment before it was adopted by the people in 1966, in which it was stated:

> "In 1876, when the present constitution was adopted, the state was largely rural and through the years one of the main

For the first one hundred years of its existence, Texas was largely a rural State. By 1965, increased urbanization had caused increased market values on agricultural lands near metropolitan areas due to industrial expansion, residential subdivisions, and speculative buying. Payment of taxes on market value as required by the Constitution of 1876 was discouraging farmers and ranchers from continuing their agricultural uses and was in some instances forcing sales and loss of both land and personnel from the essential business of producing food and fiber. See the Texas Legislative Council Report cited in note 2 and Report to the 62nd Legislature of the Agricultural Land Assessment Study Committee under H.C.R. 8, 61st Leg., Reg. Session.

The problem is shared by other states. Agricultural assessment aid with assessments based on value for agricultural uses rather than market values, has been extended

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forces behind constitutional change has been that of increasing urbanization. As the cities have grown, surrounding land areas have increased rapidly in value. Ordinarily, the owners of land on the fringes of urban areas have welcomed the great capital gains arising from the sale of their land. The profits have more than compensated for the higher tax levies. However, a farmer or rancher who continues to look upon his land as a home and means of livelihood suffers from the high taxes imposed when the city expands toward his property line. This amendment is designed to give him some relief from the increasing tax burden which might eventually drive him off his land."

Under arguments stated by the Council in favor of the amendment, it was said:

"Family farming is a wholesome occupation but is often a risky or marginal business. Any extra burden placed on the family farmers threatens to drive thousands off the land and onto the unemployment and welfare rolls. When the city approaches the farm, the tax burden to the farmer often becomes prohibitive. An equitable tax adjustment, such as the one proposed by this amendment will help to preserve the family farm."

Legislative Reference Library, Capitol Building, Austin, Texas.

to farm and ranch lands in 34 states, with proposed legislation pending in at least two other states.[3] Most of the other states do not have the type of bona fide farmer-rancher safeguard that is a part of the Texas enactment, but many require that the land produce a minimum annual gross income.

Only Texas and Alaska appear to consider income of the landowner in determining the land's eligibility for the agricultural assessment. The Alaska statute, enacted in 1974, follows many provisions of the Texas statute, but it is less cumbersome. For instance, its bona fide farmer provision requires only that the owner or lessee "must be actively engaged in farming the land, and derive at least 10 percent of his yearly gross income from the farm use land," with a specific exception in the event of a crop failure.[4]

It is obvious that the Texas "primary occupation and source of income" requirement was intended to prevent the lower agricultural assessment from being abused by allowing land investors and speculators to reduce their assessments and taxes simply by planting a crop or running livestock on the land. The provision also has the salutary purpose of encouraging not only that agricultural

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3. An Analysis of Present and Proposed Texas Laws on Use-Value Assessment of Agricultural Land, prepared by Michael Moeller for the Texas Legislative Property Tax Committee, June, 1975. For a discussion of the general problem and varying state solutions, see also Recent Legislation—Ad Valorem Taxation of Agricultural Land in Tennessee, 4 Memphis St. L. Rev. 127 (1973); Property Taxation of Agricultural and Open Space Land, 8 Harvard J. Leg. 158 (1970); and Wershow, Ad Valorem Taxation and Its Relationship to Agricultural Land Tax Problems in Florida, 16 U. Fla. L. Rev. 521 (1964).

4. Alaska Mun. Gov. §29.53.035 (Supp. 1974).

and ranch land be continued in production but that farmers and ranchers remain in the business of such production. So long as it is thus interpreted, we do not believe the classification will encounter the possible constitutional objections conditionally raised by Petitioner Gragg. The provision has been so interpreted in at least two Texas cases, *San Marcos Consolidated Independent School District v. Nance,* 495 S.W.2d 335 (Tex.Civ.App. 1973, writ ref. n.r.e., 502 S.W.2d 694, 1974), and *Klitgaard v. Gaines,* 479 S.W.2d 765 (Tex.Civ.App. 1972, writ ref. n.r.e.). See also Opinion of the Attorney General of Texas, M-1271, November 28, 1972.

Gross Income To Be Considered

We agree with Petitioner Gragg's contention that the "primary occupation and source of income" provision contemplates "gross" rather than "net" income. It is our duty in construing the Constitution to ascertain and give effect to the plain intent and language of the framers of a constitutional amendment and of the people who adopted it. *Deason v. Orange County Water Control and Imp. Dist., No. 1,* 151 Tex. 29, 244 S.W.2d 981, 984 (1952); *Cramer v. Sheppard,* 140 Tex. 271, 167 S.W.2d 147 (1942). When, as here, certain language is not plain, it is our duty to determine the intent from the other provisions, including the general purpose, of the entire enactment.

In writing and submitting to the electorate Section 1-d of Article 8, the Legislature failed to insert the word "net" or "gross" ahead of the word "income." We are not authorized to supply a missing word for the purpose of clarity, but it is our duty to determine by recognized rules or judicial interpretation whether the Legislature in-

tended the comparison of sources of income to be based upon net or gross income. We have concluded that this determination must be based upon the manner and context within which the term is used. This is because the word "income" is susceptible of various meanings. It has been interpreted by courts to mean "net" or "gross," depending upon the connection in which it is used. In *Words and Phrases,* there are 116 pages of definitions of "income." See 20A *Words and Phrases,* 163-279.

Different editions of the same legal dictionaries carry different definitions of "income," depending upon the cases cited. For instance, the 1933 edition of *Black's Law Dictionary* defined the term as "that which comes in or is received from any investment of capital, without reference to outgoing expenditures; while 'profits' generally mean the gain which is made upon any business or investment when both receipts and payments are taken into account . . .," citing *People v. Niagra County,* 4 Hill (N.Y.) 20, and *Bates v. Porter,* 74 Cal. 224, 15 P. 732. *Black's Law Dictionary* 944 (3rd ed. 1933). The 1968 edition gives a broader definition, including "return in money" and "profits," as follows: "The return in money from one's business, labor, or capital invested; gains, profits, or private revenue," citing *In re Slocum,* 169 N.Y. 153, 62 N.E. 130 (1901). *Slocum* involved a bequest of "the income of my said estate, after deducting the necessary costs and expenses of investing the property and collecting the income . . . ." See the lower court opinion in the same case, styled *In re Austin's Will,* 69 N.Y.Supp. 1036 (1901).

There have been numerous cases in which the use of the word "income" has been held to mean "net income"

because of the circumstances, purposes, and manner of its use, but which recognize that under other circumstances the word should be interpreted to mean "gross income." Such a case was *Fullerton v. Central Lincoln People's Utility District,* 201 P.2d 524 (Ore. 1948), wherein the court said:

> "The word 'income' is capable of a variety of meanings, depending upon the manner of its use. The ordinary meaning, without qualification, is as follows: ' "Income" means that which comes into or is received from any business or investment of capital, without reference to the outgoing expenditures. The term, when applied to the affairs of individuals, expresses the same idea that "revenue" does when applied to the affairs of a nation.' 4 Words and Phrases, First Series, page 3504, [20 Words & Phrases, Perm.Ed., p. 492]."

A leading case on the subject in Texas is *Houston Belt & Terminal Ry. Co. v. Clark,* 122 S.W.2d 356 (Tex. Civ.App. 1938, affirmed, 135 Tex. 388, 143 S.W.2d 373, 1940), in which the question was whether the railroad company was exempted from payment of a franchise tax under a provision that "this act shall not apply to corporations organized as terminal companies not organized for profit, and having no income from the business done by them." In holding that the company had "income," the court said:

> "The term 'income' ordinarily means that 'which comes into or is received by any business or investment of capital, without reference to the outgoing expenditures.' 4. Words and Phrases, First Series, p. 3504. Income is the 'gain which proceeds from property, labor, or business.' 1 Bour. Law Dict., Rawle's Third Rev., p. 1527. The statutes use the word 'income' or the phrase 'income from the business done by them,' in the sense of any income, as distinguished from net income."

In affirming, this Court said:

> "The contention of the terminal company finds complete answer in the opinion of the Court of Civil Appeals, which we approve in its entirety."

See also *Humble Oil & Refining Co. v. Calvert,* 478 S.W.2d 927 (Tex. 1972); *San Marcos Consolidated Independent School District v. Nance,* 495 S.W.2d 335 (Tex.Civ.App. 1973, writ ref. n.r.e.); *Denver Live Stock Comm. Co. v. Comm. of Internal Revenue,* 29 F.2d 543 (8th Cir. 1928); *Crider Bros. Comm. Co. v. Comm. of Internal Revenue,* 45 F.2d 974 (8th Cir. 1931); *In re Knight,* 9 F.Supp. 502 (Conn. D.C. 1934); *Opinion of the Justices,* 47 So.2d 729 (Ala. 1950); *State v. Morgan Gin Co.,* 189 So. 817 (Miss. 1939); *Fullerton v. Central People's Utility Dist.,* 201 P.2d 524 (Ore. 1948); *State ex. rel. McKay v. Keller,* 191 So. 542 (Fla. 1939); *W. C. Sharp Drug Stores v. Hansand,* 144 S.W.2d 777 (Tenn. 1940).

In *San Marcos Consolidated Independent School District v. Nance, supra,* the decision in favor of farmer-rancher taxpayers was based on their *gross* income. Instructions to the jury which were held to be correct by the Court of Civil Appeals included the following:

> "You are instructed that the term 'income,' as used in this charge, means that which comes in or is received from any occupation or business venture or investment of capital without reference to the outgoing expenditures."

A similar term in the Federal Bankruptcy Act referring to farmer's income was held to mean gross income in the case of *In re Knight*, 9 F.Supp. 502 (Conn.D.C. 1934). The statute, 11 U.S.C.A. §203(r) or Bankruptcy Act, §75(r), provided:

> "The term 'farmer' means any individual who is personally bona fide engaged primarily in farming operations or the principal part of whose income is derived from farming operations.

In discussing the meaning of "income," the court said:

> "And 'income' I construe to mean 'gross income.' Otherwise, when, by drought or depressed market conditions, the agricultural producer operates at a loss, he would cease to be a farmer entitled to the benefits of the act, if he had any net income from nonfarming operations. Certainly Congress did not intend that such a producer should cease to be a 'farmer' and lose the benefits of the act at the very time when he is most in need."

The purpose of the self-enacting constitutional amendment and the manner in which the term was used in Section 1-d of Article 8 indicate that gross income was to be considered rather than net income. Use of the word "source" contributes to this conclusion. The word "source" as respects matters of taxation has been held to mean origin. *Goldberg v. Gray*, 297 N.W. 124, 70 N.D. 663 (1941). This and other terms of the amendment indicate an interest in the origin of the landowners gross income to determine whether he is a bona fide farmer or rancher. Since the amendment is self-enacting, it is believed that if net income had been intended, there would have been provisions as to how net income would be determined; whether it would be figured before or after taxes; whether

depreciation would be allowed and if so at what rate; as well as other provisions necessary in determining net as opposed to gross income.

Furthermore, the interpretation contended for by the school district would defeat the purpose of the amendment. In almost insurmountable obstacle would be placed in the path of bona fide farmers and ranchers if their qualification under the amendment were to be tested by source of net income rather than gross income. There is a great difference, especially for those who depend upon the soil for their livelihoods. It is commonly known that farmers and ranchers require large expenditures in their operations and usually receive comparatively larger gross income than net income. Many of such bona fide farmers and ranchers depend upon additional sources of revenue in order to supplement their income from agricultural pursuits.[5]

Meaning of "Primary" Occupation and Source of Income

For some of the same reasons stated above with respect

5. See Report to the 62nd Legislature of the Agricultural Land Assessment Study Committee (H.C.R. 8, 61st Leg., Reg. Session), 6-14. This Committee, in its study of the Agricultural Assessment Amendment after it had been in effect for several years, said that it "feels that the assessor should look to the owner's gross income because it is an easier figure to obtain and does not reflect high operating expenses which diminish a net income." Id. 24. By 1970 the Committee found from questionnaires that only 1,433 applications were made for the agricultural use assessment and 1,053 were approved. Id. 16. Recent figures, however, based upon questionnaires submitted to school districts by the Education Resources Division of the Governor's Office, with 1,000 school districts out of 1,100 reporting, indicate that 11,727 applications for the special agricultural assessments were made in 1975, with only 739 rejections, and a total of 2,459,439 acres qualifying for the special assessments. See Preliminary Report from John H. Poerner, Director, Education Resources Office of the Governor, to the Commissioner of the Texas Education Agency dated April 15, 1976.

to the meaning of "income," we agree with Petitioner Gragg that the word "primary" should not be interpreted as requiring the farmer or rancher to receive more than 50% of his total gross income from his farming or ranching business.

The word "primary" has a plain and simple meaning of chief, first, or foremost in degree, quality, or importance or in a list, series or sequence. It is not a synonym for "majority." Available dictionaries seem to agree substantially with Webster's Third New International Dictionary (1967) which defines "primary" as "first in rank or importance; chief, principal," or the additional meaning given in the American College Dictionary (1957), "first in order in any series, sequence, etc."

A similar definition was employed in *San Marcos, supra,* wherein the following instruction of the trial court was approved:

> You are instructed that the term "primary," as used in this charge, means principal; chief; and greater portion of.

It has been specifically held that "primarily engaged in manufacturing" does not mean that a corporation must receive from manufacturing "over fifty percent" of its income in order to qualify for a statutory offset against corporate excise taxes granted to any corporation "which is primarily engaged in manufacturing, processing or assembling materials into finished products . . ." *Industrial Refrigerator Equipment Co. v. State Tax Commission,* 408 P.2d 937 (Ore. 1965). In that case manufacturing and assembling constituted 46% of the corporation's four sources of income in 1959 and 30% in 1962. These percentages were not exceeded by revenues from any of the three other categories of activities (rentals, sales, or services). In holding the corporation eligible, the court said:

> We believe that "primarily" means "chiefly" or "principally" but that it does not necessarily mean "over fifty percent." The Commission contends that in determining the ratio of activities only two factors should be considered — manufacturing and non-manufacturing — and that Plaintiff is not entitled to the offset as it was not primarily engaged in non-manufacturing activities. We cannot accept this premise. If the legislature so intended, it could have used the words "over fifty percent" or similar words describing more than half. It did not. "Primary" can be given its usual meaning without requiring that it be more than fifty percent.
>
> . . . .
>
> We hold that "primarily" as used in ORS 317.070 (2) means the largest category of several categories, but not necessarily more than fifty percent of the total volume of business.

We hold that a landowner seeking the agricultural use designation and assessment can qualify by discharging his burden of timely showing in a proper administrative or judicial proceeding that his land is designated for agricultural use under the terms of Sec. 1-d of Article 8, including a showing that such use is a business which is his primary occupation and source of income, without showing that his agricultural business occupies more than 50% of his time or accounts for more than 50% of his total gross income for the relevant years. It is sufficient if the landowner shows that he devotes a greater amount of time to his agricultural business than to any other oc-

cupations or businesses and that he receives more gross income from his agricultural business than from any other occupation or business. As hereafter shown, Petitioner Gragg failed to carry his burden of proof timely or satisfactorily with reference to his gross income from agriculture as compared to other business ventures.

It has been suggested that this interpretation might lead toward the fractionalization of other businesses conducted by a farmer-landowner in order to make his gross receipts from agricultural uses larger than any one of several of his other businesses. Tax assessors are given sufficient authority under the amendment to ferret out and ignore any such artificial arrangements designed to qualify for the special agricultural tax assessment. If a landowner-agriculturalist with a greater gross income from the oil business or any other occupation intentionally divides his business into multiple corporations or partnerships for the purpose of making his agricultural income greater than the gross income of any one of the multiple separate but related business entities, the tax assessors have the authority to deny the application and prevent wrongful use of the agricultural assessment amendment.

Other Sources of Gross Income Should Include Only Business Occupations, Ventures or Investments

Petitioner Gragg contends that only sources of gross income from occupations or business ventures carried on for profit should be compared with gross income from agricultural sources in determining eligibility for the agricultural use designation. This seems to be the clear intent of the agricultural assessment amendment. Only farmers and ranchers who conduct agricultural uses of the soil "as business venture for profit" are eligible, and

then only if such business venture "is the primary occupation and source of income of the owner." It would seem grossly unfair to disqualify a farmer or rancher because of greater receipts from social security, retirement pay, or any other source which was not an occupation or business venture operated for profit. In *Klitgaard, supra,* it was held that proceeds from several sales of land, principal and interest payments on notes given as partial payment for said lands, rentals from inherited commercial property, and oil and gas bonus and delay rentals from unsolicited mineral leases were occasional, isolated, and not part of any business venture. Therefore it was held that none of such receipts comprise the type of income from an occupation which must be balanced against the gross income from agricultural uses. The Court of Civil Appeals held: "Eligibility for benefits of the amendment is not to be determined by the vagaries of nature or the market, nor by fortuitous investment or inheritance."

In *San Marcos, supra,* the trial court specifically instructed the jury that it should not consider the receipt by the owner of delay rentals or bonuses from non-producing oil and gas leases on the taxed lands; use of the land for residential purposes; or the receipt by the owner of any annuities, retirement income, pensions, social security payments, or old age assistance. We approve this instruction, because none of these uses or receipts constituted income from occupations or business ventures of the landowners. The non-agricultural sources of income to be considered in determining a landowner's "primary source of income" should be those produced from his activity or business ventures in which he works or gives continuing supervision or attention. In *San Marcos* the jury was charged as follows:

> "You are instructed that the term 'income,' as used in this charge, means that which comes in or is received from *any occupation or business venture or investment of capital* without reference to the outgoing expenditures." (Emphasis added.)

We approve that construction except with reference to "investment of capital." Income from capital investments should not be considered when the receipts come from the sale of long held assets or as the consequence of an occasional purchase, sale, or investment or loan of funds. The gross income from the investment of capital should be considered only if such investments constitute an occupation or business which requires the management or continuing supervision or attention of the landowner.

Under the facts in the present case we approve the trial court's consideration of investment income, because Mr. Gragg did not discharge his burden of proving that such receipts were not returns from related or separate business ventures or occupations.

In both *San Marcos* and *Klitgaard, supra,* it was held that the burden is upon the landowner claiming the agricultural use designation to show the tax assessor, or a court that he is entitled to the designation. Petitioner Gragg wholly failed to attack by appeal or seek injunctive relief from the assessment of his property upon which the school district's suit is based. He sat by and permitted the assessments to be made, the tax rolls to be prepared, and this suit for taxes to be filed against him before challenging the refusal of the tax assessor to give his land the agricultural use designation. The proper procedure would have been to seek an injunction or mandamus requiring the tax assessor to give the agricultural designation as was done in *San Marcos* and *Klitgaard, supra.*

Even if the tax assessor had been given all of the evidence on this taxpayer's income that was introduced at the trial, the denial of the agricultural use designation would have been justified. The taxpayer's gross agricultural income during the three calendar years of 1970, 1971 and 1972 (added together), was approximately $1 million, as compared with $1.5 million income from all other sources. He admitted that his income reported from his oil operations was "net" rather than the "gross," which he contended for and reported in connection with his agricultural income. There was simply no proof of his gross income from the oil business. Neither was there any proof that the gross receipts from his oil operations or another business venture did not exceed the gross receipts from his agricultural business.

The record fails to show that the denial of the agricultural use exemption to this taxpayer by the tax assessor was unreasonable, arbitrary or in violation of requirements of the law. The burden fell upon the taxpayer to make that showing, and the trial court and Court of Civil Appeals have correctly held that the taxpayer failed to do so. See *State v. Whittenburg,* 153 Tex. 205, 265 S.W.2d 569 (1954); *State v. Houser,* 138 Tex. 28, 156 S.W.2d 968 (1941).

The judgment of the Court of Civil Appeals is affirmed.

/s/ PRICE DANIEL
Price Daniel
Justice

Opinion delivered: June 16, 1976

Concurring opinion by Justice Reavley in which Justices McGee and Johnson join.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the attached and foregoing seventeen (17) pages contain a true and correct copy of the opinion of the Supreme Court of Texas in the case of O. L. Gragg v. Cayuga Independent School District, No. B-5444, From Anderson County, Twelfth District, as the original of same appears of record on file in this office.

IN TESTIMONY WHEREOF, Witness my hand and the Seal of the Supreme Court of Texas, at the City of Austin, on this 1st day of September, 1976.

(S E A L)

GARSON R. JACKSON, CLERK

/s/ EUGENE CERVENKA
By Eugene Cervenka, Deputy

APPENDIX D

ORDERS OF THE SUPREME COURT OF TEXAS

D–1 Order granting motion of appellant for rehearing on his motion for writ of error, and setting aside previous order denying said writ.

D–2 Judgment of Supreme Court of Texas.

D–3 Order denying motion of appellant for rehearing on Judgment of the Supreme Court of Texas.

D–4 Notice of appeal to the Supreme Court of the United States, and proof of service thereon.

D–5 Order granting appeal to the Supreme Court of the United States and staying mandate to November 1, 1976.

D–1 Order granting motion of appellant for rehearing on his motion for writ of error, and setting aside previous order denying said writ.

SUPREME COURT OF TEXAS

* * * * * * * *

November 19, 1975.

No. B-5444.

O. L. Gragg	)	
	)	
v.	)	From Anderson County,
	)	Twelfth District.
Cayuga Independent	)	
School District	)	

Motion for rehearing on behalf of O. L. Gragg, filed herein on November 5, 1975, having been duly considered, it is ordered that said motion be, and hereby is, granted.

It is further ordered that the order entered on October 22, 1975, Refusing the Application, No Reversible Error be, and hereby is, set aside, and the following order is now entered in lieu thereof:

Application of petitioner for writ of error to the Court of Civil Appeals for the Twelfth Supreme Judicial District having been duly considered, it is ordered that said application be, and hereby is, granted, and that writ of error issue as prayed for therein.

\- - - - - - -

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above is a true and correct copy of the order of the Supreme Court of Texas in the case of O. L. Gragg v. Cayuga Independent School District, No. B-5400, From Anderson County, Twelfth District, as the copy of such order appears in the minutes of said Court under the date of November 19, 1976.

IN TESTIMONY WHEREOF, Witness my hand and Seal of the Supreme Court of Texas, as the City of Austin, on this 2nd day of September, 1976.

(S E A L)

GARSON R. JACKSON, CLERK

/s/ EUGENE CERVENKA
By Eugene Cervenka, Deputy.

D–2 Judgment of Supreme Court of Texas

SUPREME COURT OF TEXAS

* * * * * * *

June 16, 1976.

No. B-5444.

O. L. Gragg	)	
	)	
v.	)	From Anderson County,
	)	Twelfth District.
Cayuga Independent	)	
School District	)	

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Twelfth Supreme Judicial District and the original transcript and transcript showing the proceedings in the Court of Civil Appeals, having been duly considered, because it is the opinion of the Court that there was error in the judgment of the Court of Civil Appeals, which affirmed the judgment of the District Court, it is, therefore, *adjudged, ordered* and *decreed* that the judgment of the Court of Civil Appeals be, and hereby is, affirmed, and accordingly Cayuga Independent School District have and recover of and from petitioner, Oscar Lee Gragg, and his sureties, on his supersedeas bond, Billy H. Gragg and Bob Reeves, the amount as stated in such bond.

It is further ordered that petitioner, Oscar Lee Gragg, and his sureties, Billy H. Gragg and Bob Reeves, pay all costs expended and incurred in this Court and Court of

Civil Appeals, and that this decision be certified to the District Court of Anderson County, Texas, for observance.

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I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above is a true and correct copy of the judgment of the Supreme Court of Texas in the case of O. L. Gragg v. Cayuga Independent School District, No. B-5444, From Anderson County, Twelfth District, as the copy of such judgment appears in the minutes of said Court under the date of June 16, 1976.

IN TESTIMONY WHEREOF, Witness my hand and the Seal of the Supreme Court of Texas, at the City of Austin, on this 1st day of September, 1976.

(S E A L)

GARSON R. JACKSON, CLERK

/s/ EUGENE CERVENKA
By Eugene Cervenka, Deputy.

D–3 Order denying motion of appellant for rehearing on Judgment of the Supreme Court of Texas.

SUPREME COURT OF TEXAS

* * * * * * * *

July 21, 1976.

No. B-5444.

O. L. Gragg	)	
	)	
v.	)	From Anderson County,
	)	Twelfth District.
Cayuga Independent	)	
School District	)	

Petitioner's motion for rehearing, filed in the above numbered and entitled cause on June 30, 1976, having been duly considered, it is ordered that said motion be, and hereby is, overruled.

- - - - - - -

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above is a true and correct copy of the order of the Supreme Court of Texas in the case of O. L. Dragg v. Cayuga Independent School District, No. B-5444, From Anderson County, Twelfth District, as the copy of such order appears in minutes of said Court under the date of July 21, 1976.

IN TESTIMONY WHEREOF, Witness my hand and the Seal of the Supreme Court of Texas, at the City of Austin, on this 1st day of September, 1976.

(S E A L)

GARSON R. JACKSON, CLERK

/s/ EUGENE CERVENKA
By Eugene Cervenka, Deputy.

D–4 Notice of appeal to the Supreme Court of the United States, and proof of service thereon.

IN THE SUPREME COURT OF THE STATE OF TEXAS

O. L. GRAGG, Appellant	§	
	§	
v.	§	NO. B-5444
	§	
CAYUGA INDEPENDENT SCHOOL DISTRICT, Appellee	§	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that O. L. Gragg, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Honorable Supreme Court of Texas, affirming the decision of the Honorable Court of Civil Appeals for the 12th Supreme Judicial District of Texas, and the Trial Court (the District Court for the Third Judicial District of Texas), which decision of the Honorable Supreme Court was entered in this action on June 16, 1976, and which motion for rehearing thereon was overruled on the 21st day of July, 1976.

That portion of said judgment from which appeal is taken is that which holds that Article VIII, 1-d of the Texas Constitution is not violative of the Fourteenth Amendment of the Constitution of the United States in denying the benefits of said amendment to bona fide

agriculturists who fail to prove that their gross agricultural income is greater than any single source of non-agricultural business income, while granting the benefits of said article to those bona fide agriculturists who do so prove. Said Article VIII, 1-d so applied is invalid by reason of repugnancy to the Fourteenth Amendment of the Constitution of the United States, and is violative thereof.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ BILLY H. GRAGG
Billy H. Gragg
Attorney for O. L. Gragg,
Appellant
P. O. Box 678
Palestine, Texas 75801

Bob Reeves
Attorney for O. L. Gragg,
Appellant
P. O. Box 93
Palestine, Texas 75801

IN THE SUPREME COURT OF THE STATE OF TEXAS

O. L. GRAGG, Appellant	§	
	§	
v.	§	NO. B-5444
	§	
CAYUGA INDEPENDENT SCHOOL DISTRICT, Appellee	§	

PROOF OF SERVICE

I, Billy H. Gragg, one of the attorneys for O. L. Gragg, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 26th day of July, 1976, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

1. On the Cayuga Independent School District, by mailing a copy in a duly addressed envelope, postage prepaid, to James E. Pritchard, Attorney for Appellee, 200 Seminary South Office Building, Fort Worth, Texas, 76115.

2. On Amicus Curiae, the Texas and Southwestern Cattle Raisers Association, by mailing a copy in a duly addressed envelope, postage prepaid, to Mr. Ed Small, Attorney at Law, Austin National Bank Tower, Suite 2600, Austin, Texas, 78701.

3. On Amicus Curiae, the Texas Sheep and Goat Raisers Association, by mailing a copy in a duly addressed envelope, postage prepaid, to Mr. John Mark McLaughlin, Attorney at Law, 901 First Savings Building, San Angelo, Texas, 76901.

It is further certified that all parties required to be served have been served.

/s/ BILLY H. GRAGG
Billy H. Gragg
Attorney for O. L. Gragg,
Appellant
P. O. Box 678
Palestine, Texas 75801

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the attached and foregoing three (3) pages contain a true and correct copy of the petitioner's notice of appeal to the Supreme Court of the United States in the case of O. L. Gragg v. Cayuga Independent School District, No. B-5444, as the original of same appears of record on file in this office.

IN TESTIMONY WHEREOF, Witness my hand and Seal of the Supreme Court of Texas, at the City of Austin, on this 2nd day of September, 1976.

(S E A L)

GARSON R. JACKSON, CLERK
/s/ EUGENE CERVENKA
By Eugene Cervenka, Deputy.

D–5 Order granting appeal to the Supreme Court of the United States and staying mandate to November 1, 1976.

SUPREME COURT OF TEXAS

* * * * * * * *

July 28, 1976.

No. B-5444.

O. L. Gragg	)	
	)	
v.	)	From Anderson County,
	)	Twelfth District.
Cayuga Independent	)	
School District	)	

Petitioner's notice of appeal to the Supreme Court of the United States, as well as his request to withhold the issuance of the mandate, filed in the above numbered and entitled cause this day, having been duly considered, it is ordered that the notice of appeal be, and hereby is, granted, and accordingly the issuance of the mandate be, and hereby is, ordered withheld until November 1, 1976 pending the appeal to the Supreme Court of the United States.

- - - - - - -

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above is a true and correct copy of the order of the Supreme Court of Texas in the case of O. L. Gragg v. Cayuga Independent

School District, No. B-5444, from Anderson County, Twelfth District, as the copy of such order appears in the minutes of said Court under the date of July 28, 1976.

IN TESTIMONY WHEREOF, Witness my hand and Seal of the Supreme Court of Texas, at the City of Austin, on this 9th day of September, 1976.

(S E A L)

GARSON R. JACKSON, CLERK

/s/ EUGENE CERVENKA
By Eugene Cervenka, Deputy.

APPENDIX E

Opinion of the Attorney General of the State of Texas

THE ATTORNEY GENERAL
OF TEXAS

Austin, Texas 78711

Crawford C. Martin
Attorney General

November 28, 1972

Honorable Joe Resweber
County Attorney
Harris County Courthouse
Houston, Texas 77002

Honorable Fred P. Holub
County Attorney
Matagorda County
Courthouse
P. O. Box 1527
Bay City, Texas 77414

Opinion No. M-1271

Re: Meaning of "primary occupation and source of income of the owner" when assessing land used for agricultural purposes under Article VIII, Section 1-d of the Texas Constitution.

Gentlemen:

You have each submitted opinion requests which involve an interpretation of Article VIII, Section 1-d of the Texas Constitution. Both requests ask whether land may receive the "agricultural use" designation provided by Article VIII, Section 1-d when the owner's income from other sources exceeds the income derived from agricultural use of the land. Section 1-d of Article VIII reads as follows:

"§1-d. Assessment of land designated for agricultural use

Sec. 1-d. (a) All land owned by natural persons which is designated for agricultural use in accord-

ance with the provisions of this Section shall be assessed for all tax purposes on the consideration of only those factors relative to such agricultural use. 'Agricultural use' means the raising of livestock or growing of crops, fruit, flowers, and other products of the soil under natural conditions as a business venture for profit, which business is the primary occupation and source of income of the owner.

(b) For each assessment year the owner wishes to qualify his land under provisions of this Section as designated for agricultural use he shall file with the local tax assessor a sworn statement in writing describing the use to which the land is devoted.

(c) Upon receipt of the sworn statement in writing the local tax assessor shall determine whether or not such land qualifies for the designation as to agricultural use as defined herein and in the event it so qualifies he shall designate such land as being for agricultural use and assess the land accordingly.

(d) Such local tax assessor may inspect the land and require such evidence of use and source of income as may be necessary or useful in determining whether or not the agricultural use provision of this article applies.

(e) No land may qualify for the designation provided for in this Act unless for at least three (3) successive years immediately preceding the assessment date the land has been devoted exclusively for agricultural use, or unless the land has been continuously developed for agriculture during such time.

(f) Each year during which the land is designated for agricultural use, the local tax assessor shall note on his records the valuation which would have been made had the land not qualified for such designation under this Section. If designated land is subsequently diverted to a purpose other than that of agricultural use, or is sold, the land shall be subject

to an additional tax. The additional tax shall equal the difference between taxes paid or payable, hereunder, and the amount of tax payable for the preceding three years had the land been otherwise assessed. Until paid, there shall be a lien for additional taxes and interest on land assessed under the provisions of this Section.

(g) The valuation and assessment of any minerals or subsurface rights to minerals shall not come within the provisions of this Section."

The request submitted by Honorable Joe Resweber suggests that Article VIII, Section 1-d(a) is violative of both the equal protection and due process clauses of the Constitution of the United States. In the brief furnished in connection with this request, the writer assumes that where revenue from a sale of agricultural land exceeds the profit resulting from agricultural use of the balance of the land, the right to the designation of agricultural use is lost. Taking this result as a premise, it is submitted that Article VIII, Section 1-d(a) is violative of the equal protection and due process clauses of the Constitution of the United States.[1]

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1. In reaching this conclusion, the writer recognizes that, generally speaking, there is nothing in the Federal Constitution which requires that State taxation be equal, uniform or just (citing *Shaffer v. Carter*, (1920) 252 U.S. 27, 40 S.Ct. 221) if the practical operation of the tax bears a relation to opportunities, protection or benefits conferred by the State (citing *State of Wisconsin v. J. C. Penney Co.*, (1941) 61 S.Ct. 246, 311 U.S. 435). Nevertheless, the due process and equal protection clauses afford protection against discriminatory taxation (citing *Morton Salt Co. v. City of South Hutchinson*, (1947) 159 F.2d 897) within an otherwise reasonable classification for tax purposes (citing *Phillips Chemical Co. v. Dumas Independent School Dist.*, (1960) 80 S.Ct. 474, 361 U.S. 376). Even though numerous cases recognize the power of the State to treat agricultural land differently from non-agricultural land, a taxing scheme which imposes a greater tax upon a taxpayer simply because he is better able to bear its burden amounts to an abusive and unreasonable discrimination within the class (citing *Bromley v. McCaughn*, (Dist. Ct. Penna., 1928) 26 F.2d 380).

The recent decision of *Klitgaard v. Gaines*, 479 S.W.2d 765 (Tex. Civ. App. 1972, error ref., n.r.e. [Motion for Rehearing overruled November 1, 1972]) destroys the premise on which the question of constitutionality is predicated. *Klitgaard* holds that sporadic sales and other transactions there involved which resulted in income in excess of that derived from agricultural use of the land did not affect the owner's right to agricultural use designation where such use constituted the business and primary occupation and source of income of the owner.

In *Klitgaard*, the taxpayers had lived on the land for many years and, with the exception of a few months, had farmed and ranched it continuously during that time, personally supervising and laboring in raising crops and livestock. This operation was conducted at all times as a business venture for profit. During the taxable years in question, the taxpayers received money from other sources, including the following: principal and interest on occasional land sales; rental of commercial property acquired by inheritance; oil and gas bonus and delay rentals from certain mineral leases on a ranch in another county, no production of minerals being involved. Three of the sales involved were to irrevocable trusts created for the benefit of the taxpayers' children, for which sales a note was given, payable with interest within five years. The trial court found these sales to be *bona fide* at market price and a part of the taxpayers' estate plan. It further expressly found such sales were not a business venture of the taxpayers. Additional sales resulted in partial payments being made in the taxable years, and a sale was also made of part of a ranch in another county which was operated as a unit with the land for which designation was sought.

In holding that the use of the land constituted "agricultural use", the court emphasized the fact that taxpayers' primary occupation and source of income was their farming and ranching activities, and that the income received from the transactions above enumerated did not constitute

money received *"in any business venture or occupation within the meaning of the amendment* [Article VIII, Section 1-d]". The tax collector's emphasis on that portion of the constitutional provision which speaks of the "source of income of the owners" and his position that agricultural use designation was lost whenever non-agricultural income exceeded agricultural income in any one year was specifically rejected. At pages 769, 770, the court said:

> "In applying his dollar balancing test by determining what is agricultural and non-agricultural income, appellants' tax collector sometimes borrows from the doctrines of the Internal Revenue Service, but not 'necessarily'. On cross-examination Mr. Klitgaard, the tax collector, was asked about his guidelines in arriving at agricultural or non-agricultural income. His rather startling reply was, 'We really have no guidelines, significant guidelines relative to the law as written here, and there are many situations that arise that are very difficult to get answers to out of the law itself.'
>
> "An examination of the tax collectors' determinations as to non-agricultural income seems to bear out the accuracy of his statement. . . .
>
> * * * * *
>
> "Eligibility for the benefits of the amendment is not to be determined by the vagaries of nature or the market, nor by fortuitous investment or inheritance. But rather to qualify under the amendment one must be engaged in a bona fide effort to earn a profit from the land by agricultural operations. . . ."

Under the facts submitted by Honorable Joe Resweber, there was only one sale of a portion of the land formerly accorded agricultural use designation, which sale did not affect subsequent use of the balance for farm purposes. Under *Klitgaard*, the owner of the land is still entitled to agricultural use designation.

The question submitted by Honorable Fred P. Holub is couched in more general terms, and asks whether agricultural use designation must be denied in any case where income derived from any other source is more than 50% of the income derived from agricultural use. We reviewed in detail the facts in *Klitgaard* and the court's application of the constitutional provision thereto because that case furnishes guidelines for tax collectors in such cases. In each case, the tax collector must consider all pertinent facts in the light of *Klitgaard,* on the basis of which he must conclude whether the agricultural use of the land in question is *in fact* a "business" which "is the primary occupation and source of income of the owner".

SUMMARY

Where income from agricultural use is exceeded by income from other sources, an owner of land may still obtain agricultural use designation under Article VIII, Section 1-d of the Texas Constitution if the agricultural use of the land is *in fact* a "business" which is "the primary occupation and source of income of the owner".

Very truly yours,

/s/ CRAWFORD C. MARTIN
Crawford C. Martin
Attorney General of Texas

Prepared by Marietta McGregor Payne
Assistant Attorney General

APPROVED:

OPINION COMMITTEE

Kerns Taylor, Chairman
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John Banks

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APPENDIX F

U. S. Bureau of Census, Census of Agriculture, 1964, Vol. II, Statistics by Subjects—Chapter 8, Color, Race, and Tenure of Farm Operator, Table 25, (Reproduced in part).

TABLE 25. Farm Characteristics, by Tenure of Operator, for the United States: 1964—Continued

[Data are estimates based upon reports for only a sample of farms. See text]

SUBJECT		TOTAL ALL FARMS	COMMERCIAL FARMS BY TENURE OF OPERATOR			
			TOTAL	FULL OWNERS	PART OWNERS	MANAGERS
CHARACTERISTICS OF PERSONS IN FARM-OPERATOR HOUSEHOLDS—CON.						
INCOME OF ALL PERSONS IN HOUSEHOLD FROM SOURCES OTHER THAN FARM OPERATED:						
ALL SOURCES	HOUSEHOLDS.	2 563 655	1 996 671	774 290	911 490	8 004
	DOLLARS.	10 093 167 031	5 460 035 468	2 031 380 214	1 799 103 976	66 317 307
WAGES AND SALARIES	HOUSEHOLDS.	1 707 663	1 021 417	440 185	331 634	5 870
	DOLLARS.	6 450 996 370	3 016 123 986	1 581 640 645	937 488 882	23 088 677
NONFARM BUSINESS OR PROFESSION	HOUSEHOLDS.	310 603	187 879	95 299	62 586	1 311
	DOLLARS.	1 155 447 415	651 876 786	361 699 295	200 943 121	5 788 013
SOCIAL SECURITY; PENSIONS; VETERAN AND WELFARE PAYMENTS	HOUSEHOLDS.	784 882	411 613	258 458	96 236	1 788
	DOLLARS.	841 580 039	431 691 697	283 147 505	95 120 441	1 944 093
RENT FROM FARM AND NONFARM PROPERTY; INTEREST; DIVIDENDS; ETC	HOUSEHOLDS.	1 043 352	777 028	366 445	282 685	3 599
	DOLLARS.	1 605 143 211	1 360 342 999	604 907 789	557 381 342	15 631 724
AMOUNT OF INCOME OF ALL MEMBERS:						
$1 TO $499	HOUSEHOLDS.	323 351	273 698	116 641	87 436	1 190
	DOLLARS.	79 880 423	68 068 057	28 806 184	21 847 290	273 664
$500 TO $999	HOUSEHOLDS.	283 619	208 576	97 796	63 297	965
	DOLLARS.	208 939 316	152 113 227	71 891 787	45 907 906	673 895
$1,000 TO $1,499	HOUSEHOLDS.	248 631	171 310	83 369	52 211	701
	DOLLARS.	303 309 162	208 487 530	101 783 038	63 425 176	911 961
$1,500 TO $1,999	HOUSEHOLDS.	190 409	127 088	61 184	40 483	824
	DOLLARS.	326 890 210	217 621 356	104 900 067	69 224 281	910 072
$2,000 TO $2,999	HOUSEHOLDS.	296 298	192 334	92 811	62 981	940
	DOLLARS.	718 481 313	468 617 037	224 907 844	152 445 660	2 304 467
$3,000 TO $3,999	HOUSEHOLDS.	250 854	147 420	71 742	49 685	987
	DOLLARS.	856 393 531	502 992 965	245 174 976	168 741 975	3 227 942
$4,000 TO $4,999	HOUSEHOLDS.	221 508	116 362	56 322	38 131	685
	DOLLARS.	981 012 368	515 600 516	256 688 795	168 897 503	3 006 152
$5,000 AND OVER	HOUSEHOLDS.	749 189	359 863	192 654	117 467	2 882
	DOLLARS.	6 578 090 742	3 329 534 149	1 795 466 641	1 108 614 255	35 069 104
INCOME FROM OTHER SOURCES GREATER THAN VALUE OF FARM PRODUCTS SOLD	HOUSEHOLDS.	1 222 401	361 535	247 353	72 104	684
SOURCE OF INCOME OF ALL MEMBERS OTHER THAN FARM OPERATOR:						
ALL SOURCES	HOUSEHOLDS.	1 221 034	781 796	377 609	283 816	4 799
	DOLLARS.	2 601 782 451	1 710 634 136	850 161 248	570 574 421	13 106 557
WAGES AND SALARIES	HOUSEHOLDS.	858 760	573 037	261 343	195 826	3 652
	DOLLARS.	2 006 359 218	1 291 209 620	643 960 784	432 720 932	9 488 789
NONFARM BUSINESS OR PROFESSION	HOUSEHOLDS.	89 757	61 365	39 798	21 886	416
	DOLLARS.	302 187 858	191 301 799	73 671 395	47 901 603	1 020 889
SOCIAL SECURITY; PENSIONS; VETERAN AND WELFARE PAYMENTS	HOUSEHOLDS.	372 196	209 761	117 486	32 562	899
	DOLLARS.	249 304 622	152 779 490	83 174 288	40 830 952	770 079
RENT FROM FARM AND NONFARM PROPERTY; INTEREST; DIVIDENDS; ETC	HOUSEHOLDS.	119 438	94 292	48 890	34 901	900
	DOLLARS.	143 980 753	129 351 267	49 384 811	49 130 914	1 849 800
WORK ON FARM OPERATED DURING WEEK PRECEDING ENUMERATION:						
FARM OPERATORS		2 394 605	1 701 433	787 717	574 959	12 630
TOTAL HOURS		85 253 062	74 908 375	31 648 781	27 157 299	667 675
BY NUMBER OF HOURS WORKED:						
NONE		863 252	458 384	244 348	111 389	3 570
1 TO 14 HOURS		635 228	295 389	150 910	78 058	838
15 TO 39 HOURS		561 782	381 741	188 047	113 211	1 336
40 TO 59 HOURS		495 868	461 731	188 050	137 400	4 380
60 HOURS OR MORE		601 927	582 372	232 910	226 293	3 887
PERSONS IN HOUSEHOLD (OTHER THAN FARM OPERATOR) WORKING LESS THAN 15 HOURS:						
FARM OPERATORS REPORTING		785 923	594 028	239 213	199 399	2 517
PERSONS		1 152 978	827 319	345 802	306 705	3 688
TOTAL HOURS		8 861 577	6 550 997	2 767 842	2 427 488	28 432
PERSONS IN HOUSEHOLD (OTHER THAN FARM OPERATOR) WORKING 15 HOURS OR MORE:						
FARM OPERATORS REPORTING		789 752	671 028	305 907	242 888	3 017
PERSONS		1 076 874	933 330	411 380	348 460	4 078
TOTAL HOURS		41 491 902	36 864 998	16 364 199	14 023 925	184 606
WORK OFF FARM DURING YEAR:						
FARM OPERATORS:						
FARM OPERATORS REPORTING		1 462 183	765 302	354 301	242 521	3 283
LESS THAN 25 DAYS		228 080	212 237	80 246	76 262	604
25 TO 99 DAYS		220 903	206 686	87 871	66 508	994
100 TO 199 DAYS		121 304	81 917	26 631	20 542	338
200 DAYS OR MORE		67 783	39 778	15 319	11 494	125
		824 173	251 104	144 334	67 750	1 868
TOTAL DAYS WORKED		249 900 959	92 084 118	48 686 581	26 648 226	489 844
ON ANOTHER FARM		10 360 132	5 428 364	2 018 860	1 682 033	30 973
AT NONFARM JOBS		239 540 827	86 655 788	46 667 721	24 966 193	489 371
PERSONS IN HOUSEHOLD (OTHER THAN FARM OPERATOR):						
FARM OPERATORS REPORTING		883 445	588 802	269 281	201 246	3 784
NUMBER OF PERSONS		1 177 603	792 659	383 288	273 530	4 980
MALE		446 000	311 711	130 313	108 282	1 970
FEMALE		731 603	480 948	214 975	165 248	3 013
BY NUMBER OF DAYS WORKED:						
LESS THAN 25 DAYS		263 202	199 203	74 587	74 363	1 238
25 TO 99 DAYS		227 055	226 947	99 321	78 677	1 516
100 TO 199 DAYS		231 851	152 586	72 651	51 443	970
200 DAYS OR MORE		355 519	213 923	106 729	69 087	1 284
TOTAL DAYS WORKED		144 363 387	92 190 812	44 636 041	30 431 482	863 899
ON ANOTHER FARM		11 202 120	8 024 684	3 475 418	2 599 367	38 884
AT NONFARM JOBS		139 161 277	84 166 128	41 161 623	27 842 115	831 000

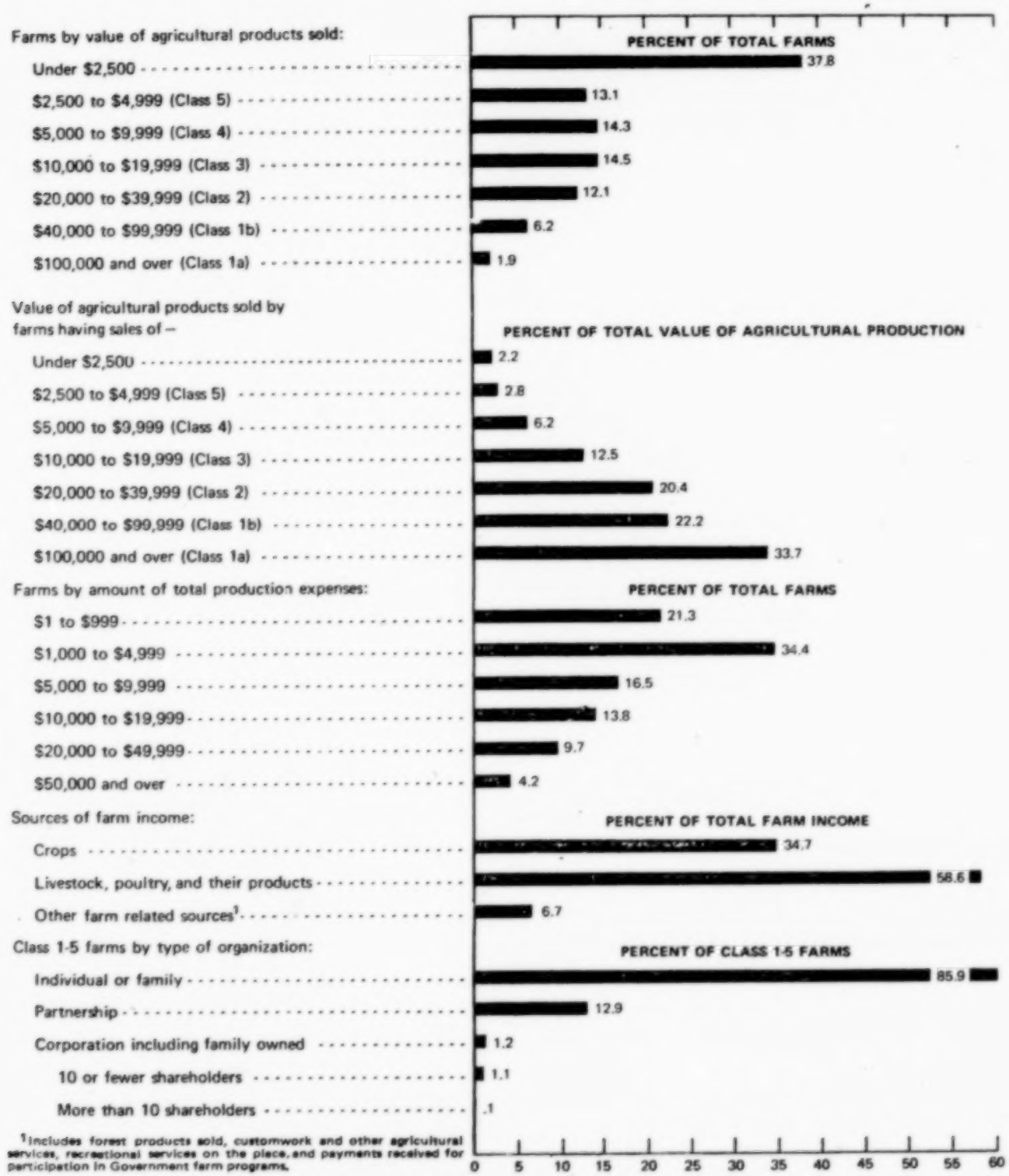
G-1

APPENDIX G

U. S. Bureau of Census, Census of Agriculture, 1969, Vol. II, General Report, Chapter 1, General Information; Procedures for Collection, Processing, Classification (Graph therefrom).

CHART 2

PROFILE of the Nation's Agriculture: 1969—Continued



[1] Includes forest products sold, customwork and other agricultural services, recreational services on the place, and payments received for participation in Government farm programs.

H-1

APPENDIX H

U. S. Bureau of Census, Census of Agriculture, 1969, Vol. V, Special Reports, Part 11, Farm Finance, (Tables 17 and 21).

Farms With Sales of $2,500 and Over

Class 1-5 Farms Table 17. Value of Agricultural Products Sold and Measures of Income of Farm Operator by Farm Characteristics

	Value of agricultural products sold							
	Total ($1,000)	Operators' share minus cash rent ($1,000)	Operators' net cash farm income ($1,000)	Landlords' share ($1,000)	Cash rent ($1,000)	Total cash and share rent ($1,000)	Operators' cash operating expenses ($1,000)	Off-farm income ($1,000)
United States	68,627,010	41,948,136	11,174,362	3,133,983	1,343,490	4,479,473	30,773,680	10,199,493
By value of sales class:								
Class 0 farms	14,091,072	13,311,705	2,933,013	457,639	436,728	879,367	12,388,093	902,807
Class 1 farms	11,983,548	10,544,628	3,068,587	1,098,548	340,371	1,438,937	7,484,031	1,377,889
Class 2 farms	9,861,046	8,093,990	2,722,784	878,966	281,063	1,160,051	5,370,213	1,018,330
Class 3 farms	9,281,841	6,710,860	1,481,028	482,931	178,049	660,980	3,239,633	1,942,686
Class 4 farms	9,512,347	3,382,904	686,298	181,354	64,486	248,843	1,577,209	2,101,733
Class 5 farms	1,897,726	1,189,642	273,941	83,006	34,780	102,956	883,804	2,048,169
Class 6 farms	(X)	(X)	(X)	(X)	(X)	(X)	(X)	(X)
Part-time farms	(X)	(X)	(X)	(X)	(X)	(X)	(X)	(X)
Part-retirement farms	(X)	(X)	(X)	(X)	(X)	(X)	(X)	(X)
By type of farm:								
Cash-grain	6,304,530	4,638,170	1,904,371	1,157,549	211,818	1,388,365	3,250,001	1,771,803
Tobacco	469,824	440,581	225,014	79,215	30,028	109,243	335,567	307,660
Cotton	836,033	700,130	90,884	60,187	83,707	133,893	609,273	385,170
Other field crop	1,187,463	1,058,583	310,089	45,864	38,206	108,672	748,503	132,036
Vegetable	907,143	848,356	198,825	15,958	42,830	58,788	651,530	69,106
Fruit and nut	1,443,674	1,302,785	387,379	38,090	23,814	50,908	1,000,484	316,149
Poultry	2,834,376	2,903,589	472,476	11,371	9,487	20,788	2,431,113	211,000
Dairy	3,537,808	3,260,539	2,073,805	133,681	107,088	241,240	1,222,674	389,259
Livestock other than poultry and dairy	11,849,588	10,887,885	2,106,087	731,455	250,538	981,993	8,781,889	2,241,024
Livestock ranches	2,031,786	1,917,442	383,483	16,277	88,068	104,344	1,533,980	481,002
General	2,203,603	1,936,083	839,803	189,432	100,078	287,511	1,406,291	587,484
Miscellaneous	1,084,628	1,060,084	319,377	3,980	16,573	19,033	745,717	186,175
No 1969 report	6,820,447	7,888,194	2,252,689	841,430	310,833	952,253	5,615,786	2,052,340
Unclassified—Value of products sold under $2,500	756,301	687,599	212,443	36,473	22,127	58,602	485,157	999,614
By tenure of operator:								
Full owners	16,436,797	16,436,797	4,855,066	-	-	-	11,581,700	4,889,602
Part owners	23,771,779	20,178,543	5,030,336	1,989,702	925,534	2,915,236	15,148,215	3,948,333
Tenants	7,219,034	5,334,798	1,228,841	1,488,291	417,956	1,884,237	4,045,958	1,424,485
Cash	2,380,948	2,380,606	427,931	-	280,483	280,483	1,671,475	458,592
Share-cash	1,624,342	1,624,342	343,940	434,331	111,463	545,794	916,607	307,980
Share	2,645,827	1,902,535	575,255	1,041,960	4,402	1,046,361	1,307,281	611,717
Other	183,937	172,306	41,715	-	11,639	11,639	130,595	58,276
By age of operator:								
Under 35 years	4,553,054	3,884,987	913,070	479,827	188,240	668,067	2,973,918	938,784
35 to 44 years	9,672,180	8,808,027	2,128,121	778,761	280,263	1,064,153	5,479,908	2,072,363
45 to 54 years	13,366,614	11,273,923	2,930,494	770,091	322,800	1,092,891	8,383,430	2,594,210
55 to 64 years	8,282,658	7,697,287	2,221,515	398,602	186,958	585,571	5,475,772	1,017,699
65 years and over	3,732,257	3,613,719	738,652	67,292	51,256	118,538	1,473,067	702,117
No 1969 report	6,820,447	7,888,194	2,252,689	841,430	310,833	952,253	5,615,786	2,052,340
By years on farm:								
Not reported	4,754,283	4,363,390	1,178,674	358,039	134,777	390,813	3,184,719	1,079,026
Under 2 years	1,561,456	1,403,548	293,712	103,071	53,798	157,870	1,109,677	627,153
2 to 4 years	3,070,817	2,738,823	592,619	231,827	108,129	331,966	2,156,833	919,186
5 to 9 years	5,162,540	4,584,070	1,148,509	409,198	167,381	578,479	3,439,541	1,141,911
10 to 14 years	4,913,653	4,438,344	1,118,888	351,818	138,997	478,309	3,216,468	916,938
15 to 19 years	5,924,712	4,480,553	1,208,336	455,198	138,973	544,160	3,273,237	922,877
20 to 29 years	8,879,742	8,061,663	2,213,840	579,990	218,193	798,078	5,887,725	1,708,091
30 years and over	4,239,830	3,990,482	1,179,175	158,848	90,506	249,347	3,811,308	803,811
No 1969 report	6,820,447	7,888,194	2,252,689	841,430	310,833	952,253	5,615,786	2,052,340
By size of farm:								
Under 50 acres	3,236,122	3,148,377	920,627	94,827	30,888	90,745	2,218,712	1,094,836
50 to 99 acres	3,402,724	3,284,827	876,832	75,169	31,095	107,067	1,618,088	1,218,417
100 to 179 acres	4,766,036	4,474,904	1,410,937	201,413	80,917	281,332	2,083,758	1,566,008
180 to 259 acres	4,877,645	4,293,884	1,407,781	287,618	98,733	384,151	2,880,713	1,150,613
260 to 499 acres	10,475,334	9,230,657	2,873,280	971,447	380,398	1,354,837	6,547,248	1,934,149
500 to 999 acres	9,773,873	7,849,674	1,912,737	913,308	289,891	1,183,199	5,476,948	1,443,533
1,000 acres and over	13,096,866	10,930,544	2,184,109	831,386	330,974	1,167,342	8,762,435	1,740,648
By value of land and buildings:								
Under $15,000	8,813,583	8,640,307	1,736,533	1,970,984	479,331	2,050,385	4,825,756	2,083,136
$15,000 to $24,999	1,984,511	1,792,998	572,180	153,333	50,219	203,553	1,330,799	673,280
$25,000 to $39,999	3,871,536	3,540,531	1,092,918	330,671	93,347	331,018	2,147,850	1,373,683
$40,000 to $59,999	5,118,152	4,736,079	1,446,386	399,126	127,951	387,077	3,281,886	1,917,068
$60,000 to $99,999	7,107,810	6,572,378	1,948,973	380,546	148,988	535,535	4,809,303	1,988,874
$100,000 to $199,999	8,488,027	7,970,731	2,087,384	338,296	190,011	515,306	5,873,437	1,313,573
$200,000 and over	11,336,879	11,080,179	2,284,065	318,047	237,633	459,750	8,814,084	1,338,947
By days operator worked off farm:								
Not reported	3,783,080	3,582,017	750,028	127,133	73,940	201,073	1,831,980	695,231
None	31,000,992	29,548,410	7,618,304	1,983,008	872,178	2,855,184	20,930,060	2,130,369
1 to 49 days	4,434,943	3,801,681	1,070,728	896,548	138,104	893,251	3,730,984	810,758
50 to 99 days	1,387,044	1,176,077	288,801	187,191	84,977	221,768	886,272	431,840
100 to 199 days	1,731,618	1,540,642	387,381	186,181	84,792	210,972	1,162,382	677,112
200 days and over	4,884,123	4,389,304	1,060,080	307,930	148,889	264,894	3,909,330	4,089,038

Farms With Sales of $2,500 and Over

Class 1-5 Farms Table 17. Value of Agricultural Products Sold and Measures of Income of Farm Operator by Farm Characteristics—Continued

	Value of agricultural products sold							
	Total ($1,000)	Operators' share minus cash rent ($1,000)	Operators' net cash farm income ($1,000)	Landlords' share ($1,000)	Cash rent ($1,000)	Total cash and share rent ($1,000)	Operators' cash operating expenses ($1,000)	Off-farm income ($1,000)
By type of organization:								
Individual	33,480,844	22,914,732	6,366,366	1,934,372	731,330	2,665,892	18,548,389	5,724,236
Partnership	8,364,737	5,813,428	1,834,730	561,000	180,395	741,301	4,066,707	1,001,029
Corporation	4,747,788	4,610,133	894,798	43,833	93,833	137,646	3,913,334	337,788
10 shareholders or less	3,804,834	3,688,801	809,783	39,848	75,478	115,324	3,079,839	306,197
More than 10 shareholders	942,948	920,823	80,024	3,977	18,345	23,322	835,489	31,570
Other and no 1969 report	9,080,288	8,113,837	3,243,947	680,109	815,934	976,033	5,788,291	3,208,821
Unclassified—Value of products sold under $2,500	756,301	687,599	212,443	36,473	22,127	58,602	485,157	999,614
By net cash farm income:								
Negative (see text)	8,545,632	5,554,970	-1,882,433	811,148	379,513	990,662	7,438,604	2,105,739
Under $1,000	1,130,384	948,268	78,381	123,584	48,433	172,017	869,902	1,001,869
$1,000 to $2,999	3,382,027	2,939,280	755,787	328,479	98,888	433,367	2,173,472	2,369,597
$3,000 to $4,999	3,133,808	2,735,913	888,833	323,848	83,648	407,194	1,833,979	1,334,347
$5,000 to $7,499	3,830,848	3,168,881	1,142,188	338,240	97,848	454,188	2,024,553	923,892
$7,500 to $9,999	3,398,383	3,039,886	1,080,285	293,822	72,976	366,797	1,844,281	555,523
$10,000 to $14,999	4,885,472	4,404,636	1,730,887	384,375	119,481	498,836	2,087,748	643,180
$15,000 to $24,999	5,938,841	5,438,174	2,238,988	380,535	129,130	509,667	3,188,194	588,457
$25,000 and over	14,527,838	13,833,881	5,142,934	355,955	318,790	874,745	8,719,238	828,008
By income from off-farm source:								
None	12,338,090	11,500,379	3,193,785	722,883	304,799	1,027,681	8,306,616	-
Under $300	2,025,368	1,853,971	401,342	125,334	47,281	172,595	1,251,630	19,529
$300 to $999	1,739,348	1,535,084	332,728	163,473	40,310	204,183	1,202,324	37,292
$1,000 to $1,999	3,373,696	3,038,474	973,014	355,243	81,868	337,211	2,063,480	232,251
$2,000 to $4,999	7,836,941	6,180,921	1,912,713	865,378	185,342	860,631	4,973,508	1,143,837
$5,000 to $7,499	4,378,888	3,781,142	1,085,377	372,949	124,512	497,483	2,713,966	1,250,042
$7,500 to $9,999	3,121,215	2,784,813	738,089	223,914	100,487	324,403	2,088,325	1,330,189
$10,000 to $14,999	3,910,951	3,526,484	798,717	988,004	119,063	384,467	2,726,757	1,943,241
$15,000 to $24,999	3,883,526	3,527,474	881,843	208,289	148,753	358,052	2,948,813	1,893,663
$25,000 and over	4,519,814	4,197,814	880,338	131,707	181,082	322,799	3,531,459	2,309,551
By total net cash income:								
Negative (see text)	4,202,983	3,822,683	-1,426,183	375,374	204,747	580,321	5,078,800	374,721
Under $1,000	613,999	548,290	-38,380	60,988	19,710	68,710	371,573	69,225
$1,000 to $2,999	1,419,538	1,197,737	192,885	168,163	53,638	221,791	1,084,643	146,957
$3,000 to $4,999	2,080,438	1,775,883	279,808	335,908	73,535	369,443	1,396,178	389,583
$5,000 to $7,499	2,980,078	2,579,078	680,934	324,983	83,909	410,800	1,893,143	724,434
$7,500 to $9,999	3,306,438	2,918,144	888,438	299,290	93,002	388,293	2,028,706	930,373
$10,000 to $14,999	5,943,643	5,252,680	1,819,548	538,710	180,883	930,403	3,432,892	3,008,818
$15,000 to $24,999	7,788,156	7,084,888	2,884,841	531,843	188,744	730,288	4,380,238	2,314,017
$25,000 and over	18,880,288	17,180,034	6,064,424	933,804	483,833	1,089,428	11,128,810	3,245,340

H-3

All Farms

Table 21. Total Off-Farm Income by Source and by Farm Characteristics

	Total		Cash wages, salaries, commissions, and tips		Operation of nonfarm business or professional practice		Government farm programs		Customwork and rental of agricultural property		Federal Social Security, pensions, retirement pay, etc.		Rental of nonfarm property, dividends, interest, and other off-farm income	
	Farms reporting	Amount ($1,000)	Farms reporting	Amount ($1,000)	Farms reporting	Amount ($1,000)	Farms reporting	Amount ($1,000)	Farms reporting	Amount ($1,000)	Farms reporting	Amount ($1,000)	Farms reporting	Amount ($1,000)
United States	1,970,251	15,083,988	1,368,437	8,639,905	536,984	1,894,387	1,062,313	3,432,087	486,910	855,185	434,289	759,303	343,006	594,150
By value of sales class:														
Class 0 farms	44,284	902,807	20,223	209,820	5,010	60,381	29,496	441,711	10,096	119,343	3,019	8,186	8,726	33,366
Class 1 farms	144,435	1,277,869	70,483	378,063	13,890	115,014	97,847	536,986	51,038	139,143	13,876	32,165	30,289	98,369
Class 2 farms	243,719	1,616,230	135,199	599,892	35,800	197,643	171,042	537,150	74,906	183,149	33,389	39,978	38,905	68,515
Class 3 farms	293,406	1,942,686	188,074	1,008,033	31,479	207,115	181,194	404,191	73,113	130,426	40,387	70,848	38,312	82,073
Class 4 farms	300,241	2,181,732	194,947	1,339,218	39,871	289,739	171,930	333,966	66,880	126,047	43,704	119,878	34,934	62,966
Class 5 farms	304,900	2,348,109	216,471	1,906,483	41,813	356,396	148,259	137,201	43,337	69,084	42,169	137,081	31,606	30,042
Class 6 farms	163,237	941,327	82,986	353,304	13,774	69,177	70,441	40,966	41,783	38,322	24,832	137,083	16,843	36,444
Part-time farms	309,043	3,809,332	247,727	3,176,586	57,052	400,061	139,762	71,081	31,449	36,651	49,564	78,857	39,786	46,078
Part-retirement farms	110,986	443,618	42,697	177,319	9,293	48,943	55,942	28,620	28,277	15,396	21,169	148,933	16,784	20,217
By type of farm:														
Cash-grain	262,924	1,942,279	143,131	835,296	38,334	139,656	198,685	634,336	60,352	180,210	48,851	75,656	37,721	62,142
Tobacco	60,753	254,147	38,193	180,595	6,532	16,917	38,402	18,075	14,488	12,320	15,704	20,331	4,304	5,990
Cotton	28,110	379,906	12,530	98,394	3,816	27,770	26,758	236,256	8,255	21,441	6,291	7,044	3,083	8,983
Other field crop	18,520	132,794	10,092	47,700	3,173	15,916	11,966	44,933	4,706	18,221	2,863	3,050	1,586	4,221
Vegetable	12,274	87,965	8,273	53,786	1,676	7,184	5,821	12,331	1,347	6,277	2,699	3,748	1,880	4,827
Fruit and nut	31,914	371,205	20,509	178,905	6,307	95,049	4,680	6,494	6,126	38,706	9,957	24,883	5,049	33,453
Poultry	33,449	219,679	23,679	182,949	3,612	22,988	13,143	13,758	8,040	8,347	5,094	7,508	2,938	6,147
Dairy	143,134	811,496	82,906	362,049	15,383	80,081	78,045	68,710	39,315	33,400	28,077	40,913	18,348	26,741
Livestock other than poultry and dairy	368,635	2,581,871	216,506	1,404,128	40,341	238,391	237,780	503,063	95,533	168,739	69,180	120,823	48,940	105,705
Livestock ranches	103,715	717,658	30,678	325,904	10,096	113,228	48,134	98,898	26,681	57,304	24,107	88,238	17,227	44,088
General	95,864	687,698	48,580	383,710	9,236	51,783	67,569	229,200	29,981	58,540	23,738	46,823	13,609	27,539
Miscellaneous	30,396	274,490	18,177	168,201	4,287	43,288	9,002	8,715	7,239	10,063	13,437	29,270	5,528	18,938
No 1969 report	238,218	2,003,917	241,822	1,778,107	43,745	368,998	170,375	459,627	79,497	185,469	66,718	122,637	48,587	94,889
Unclassified—Value of products sold under $2,500	430,718	3,819,812	355,171	3,019,231	63,347	436,222	188,221	97,480	73,285	54,685	82,580	137,322	34,583	94,781
By tenure of operator:														
Full owners	1,138,778	8,808,816	728,212	5,718,952	144,533	1,137,648	545,141	705,582	257,954	414,218	287,878	580,591	127,963	294,583
Part owners	561,564	4,379,498	337,004	2,036,670	65,213	358,731	370,136	1,348,380	148,673	215,930	73,653	121,368	61,964	200,500
Tenants	273,909	1,817,884	193,309	1,084,273	27,238	138,868	147,016	378,213	80,213	134,913	33,789	41,344	22,681	29,119
Cash	80,173	681,485	61,237	441,384	8,804	73,185	30,071	89,741	10,991	38,953	11,003	14,963	6,117	14,259
Share-cash	53,843	319,765	30,913	133,488	5,333	30,974	26,983	108,984	14,911	34,311	4,871	9,001	2,213	5,030
Share	121,930	702,030	83,875	390,301	10,704	46,715	73,763	175,137	27,391	60,119	13,900	17,881	7,136	7,190
Other	19,964	134,574	17,423	112,253	2,397	9,134	6,179	4,353	3,080	3,533	3,845	5,499	1,626	1,620
By age of operator:														
Under 35 years	188,932	1,447,348	142,367	962,695	31,237	181,162	99,381	188,610	43,534	78,557	18,497	28,756	18,996	28,968
35 to 44 years	334,048	3,038,125	241,489	1,926,381	65,917	372,902	184,357	478,788	80,042	134,649	31,781	49,863	25,689	58,454
45 to 54 years	449,203	3,726,814	314,372	2,310,910	96,431	374,342	238,301	690,267	100,872	194,980	60,807	98,588	51,212	99,684
55 to 64 years	412,698	3,701,929	249,205	1,907,234	82,804	387,082	232,117	680,195	94,478	168,548	88,113	145,896	52,883	134,996
65 years and over	334,100	1,148,935	79,173	334,389	18,710	99,831	122,908	166,571	63,660	100,798	64,374	210,190	29,630	113,781
No 1969 report	238,218	2,003,917	241,822	1,778,107	43,745	368,998	170,375	619,627	79,497	185,469	166,718	122,627	48,587	94,889
By years on farm:														
Not reported	277,713	1,807,263	193,432	1,138,989	38,681	194,380	188,389	225,775	58,789	80,878	87,748	188,135	34,894	68,796
Under 2 years	94,836	1,009,348	70,304	633,823	15,940	234,197	43,099	68,578	23,307	33,780	16,584	87,015	11,039	31,014
2 to 4 years	150,713	1,471,883	118,006	1,047,089	30,867	170,723	64,253	113,040	38,383	51,977	22,259	46,988	14,370	24,138
5 to 9 years	213,370	1,859,064	151,372	1,208,643	27,794	231,639	107,035	208,698	48,603	98,548	23,007	67,630	23,621	43,948
10 to 14 years	172,484	1,331,761	119,281	804,800	20,396	108,378	101,138	240,303	41,273	74,883	21,709	60,788	18,278	46,747
15 to 19 years	181,683	1,302,008	117,013	744,108	19,683	109,173	111,395	273,119	40,375	77,843	23,818	60,254	21,008	41,718
20 to 29 years	329,083	2,308,228	198,002	1,090,131	36,874	187,388	208,351	569,742	81,565	144,220	75,377	119,148	49,870	87,022
30 years and over	300,039	1,070,488	82,176	384,817	18,184	71,813	127,588	273,274	63,139	105,189	66,870	148,040	33,658	88,138
No 1969 report	238,218	2,003,917	241,822	1,778,107	43,745	368,998	170,375	459,627	79,497	185,469	66,718	122,627	48,587	94,889

44

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-469

O. L. GRAGG, *Appellant*,

v.

CAYUGA INDEPENDENT SCHOOL DISTRICT, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF TEXAS

Appellee's Motion to Dismiss or Affirm

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SUBJECT INDEX

Page

THE OPINIONS BELOW 1

STATEMENT OF THE GROUNDS UPON WHICH THIS APPEAL SHOULD BE DISMISSED OR THE JUDGMENT OF THE SUPREME COURT OF TEXAS AFFIRMED 2

ARGUMENT IN SUPPORT OF GROUNDS UPON WHICH THIS APPEAL SHOULD BE DISMISSED OR THE JUDGMENT OF THE SUPREME COURT OF TEXAS AFFIRMED 3

(1) The precise question presented by Appellant in his Jurisdictional Statement has previously been brought before this Honorable Supreme Court of the United States, and the Court has decided the question adversely to the position taken by the Appellant herein 3

(2) The Supreme Court of the United States does not have jurisdiction of this appeal under 28 U.S.C.A. Sec. 1257 (2), as asserted by Appellant, for the reason that the federal question sought to be reviewed was not expressly passed on by the Supreme Court of Texas 5

(3) The Supreme Court of the United States does not have jurisdiction of this appeal under 28 U.S.C.A. Sec. 1257 (2), as asserted by Appellant, for the reason that such appeal does not present a substantial federal question 5

(4) The Supreme Court of the United States does not have jurisdiction of his appeal under 28 U.S.C.A. Sec. 1257 (2), as asserted by Appellant, for the reason that the judgment of the Supreme Court of Texas rests upon an adequate non-federal basis, in that it is based upon the holding that Appellant failed to discharge his burden of proof so as to qualify himself and his lands for ad valorem tax assessments under Tex. Const. art. VIII, sec. 1-d..... 8

SUBJECT INDEX (Continued)

Page

(5) Appellant would not be entitled to any relief from the judgment of the Supreme Court of Texas even if Tex. Const. art. VIII, sec. 1-d, as applied by the Supreme Court of Texas, were held by this Supreme Court of the United States to violate the Fourteenth Amendment to the Constitution of the United States, for the reason that such a decision would require a holding invalidating Art. VIII, sec. 1-d entirely, thereby removing any constitutional basis upon which Appellant could assert a claim for ad valorem tax assessments based upon the agricultural use value of his lands 12

CONCLUSION 14

CERTIFICATE OF SERVICE 16

APPENDICES:

Appendix A (Concurring Opinion rendered in the Supreme Court of Texas 17

Appendix B (H.J.R. 79—Proposed Constitutional Amendment—Agricultural Lands-Taxation 28

INDEX OF AUTHORITIES

Page

Berea College v. Kentucky, 211 U.S. 45, 53 L.Ed 81 (1908) 9

David Graham Hall Foundation v. Highland Park Ind. School Dist., 371 S.W. 2d 762 (Tex.Civ. App.-Dallas 1963, writ ref'd n.r.e.) 11

Enterprise Irrig. Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 61 L.Ed. 644 (1917) 9

Fox Film Corp. v. Muller, 296 U.S. 207, 80 L.Ed. 158 (1935) 9-10

Gragg v. Cayuga Ind. School Dist., 539 S.W. 2d 861 (Tex. Sup. 1976) 1, 6, 7, 9

Grand Gulf R. Co. v. Marshall, 53 U.S. 165, 13 L.Ed. 938 (1851) 7

Herb v. Pitcairn, 324 U.S. 117, 89 L.Ed. 789 (1945) 10

Hilltop Village, Inc. v. Kerrville Independent School District, 410 S.W. 2d 824 (Tex. Civ. App.-San Antonio 1966, aff'd 426 S.W.2d 943 (Tex. Sup. 1968) 11

Markham Hospital v. City of Longview, 191 S.W. 2d 695 (Tex.Civ.App.-Texarkana 1946, writ ref'd) 11

Methodist Riveroaks Apartments, Inc. v. City of Waco, 409 S.W. 2d 485 (Tex.Civ.App.-Waco 1963, writ ref'd n.r.e., cert denied 389 U.S. 848) 11

Murdock v. Memphis, 20 Wall. 590, 22 L.Ed. 429 (1875) 9

Port Authority Bondholders Protective Committee v. Port of New York Authority, 270 F.Supp. 947 (D.C.N.Y. 1967), aff'd. 387 F. 2d 259 5

Quong Ham Wah Co. v. Industrial Accident Commission, 255 U.S. 445, 65 L.Ed. 723 (1921) 7-8

INDEX OF AUTHORITIES (Continued)

	Page
Radio Bible Hour, Inc. v. Hurst-Euless Independent School District, 341 S.W.2d 467 (Tex.Civ.App.-Fort Worth 1961, writ ref'd n.r.e.)	11
State v. Houser, 138 Tex. 28, 156 S.W.2d 968 (1941)	9
State v. Whittenburg, 153 Tex. 205, 265 S.W.2d 569 (1954)	9
Stein v. Lewisville Independent School Dist., 481 S.W.2d 436 (Tex.Civ.App.-Fort Worth 1972, writ ref'd n.r.e.), cert. denied 414 U.S. 948, 38 L.Ed.2d 203 (1973)	4, 11, 12, 14
U. S. v. Thirty-Seven (37) Photographs, 402 U.S. 363, 28 L.Ed.2d 822 (1971)	7
Wyley v. Warden, Maryland Penitentiary, 254 F.Supp. 727 (D.C. Md. 1966), aff'd. 372 F.2d 742, cert. denied 389 U.S. 863, 19 L.Ed. 131	5

CONSTITUTIONS, STATUTES, RULES

U. S. CONST. amend. IXV	3, 4, 5, 6, 8, 10, 12
TEX. CONT. art. VIII, sec. 1-d	3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14
28 U.S.C.A. Sec. 1257 (2)	2, 5, 7, 8, 14
U. S. Sup. Ct. Rule 16, 28 U.S.C.A.	1

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-469

O. L. GRAGG, *Appellant*,

v.

CAYUGA INDEPENDENT SCHOOL DISTRICT, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF TEXAS

Appellee's Motion to Dismiss or Affirm

Now comes Cayuga Independent School District, Appellee in the above numbered and entitled cause, and files this motion to dismiss Appellant's appeal or to affirm the judgment of the Supreme Court of Texas pursuant to and under the authority of U.S. Sup.Ct. Rule 16, 28 U.S.C.A. and in support thereof Appellee respectfully shows the Court the following:

THE OPINIONS BELOW

The written Opinion rendered by the Supreme Court of Texas is reported at 539 S.W.2d 861. The Majority Opinion of the Supreme Court of Texas is reproduced as Appendix C of Appellant's Jurisdictional Statement and for that reason is not reproduced herein, but Appellant's Jurisdictional Statement failed to include in such Appendix C the Concurring Opin-

ion rendered in the Supreme Court of Texas. A copy of such opinion appears herein as Appendix A.

STATEMENT OF THE GROUNDS UPON WHICH THIS APPEAL SHOULD BE DISMISSED OR THE JUDGMENT OF THE SUPREME COURT OF TEXAS AFFIRMED

(1) The precise question presented by Appellant in his Jurisdictional Statement has previously been brought before this Honorable Supreme Court of the United States, and the Court has decided the question adversely to the position taken by the Appellant herein.

(2) The Supreme Court of the United States does not have jurisdiction of this appeal under 28 U.S.C.A. Sec. 1257 (2), as asserted by Appellant, for the reason that the federal question sought to be reviewed was not expressly passed on by the Supreme Court of Texas.

(3) The Supreme Court of the United States does not have jurisdiction of this appeal under 28 U.S.C.A. Sec. 1257 (2), as asserted by Appellant, for the reason that such appeal does not present a substantial federal question.

(4) The Supreme Court of the United States does not have jurisdiction of this appeal under 28 U.S.C.A. Sec. 1257 (2), as asserted by Appellant, for the reason that the judgment of the Supreme Court of Texas rests upon an adequate non-federal basis, in that it is based upon the holding that Appellant failed to discharge his burden of proof so as to qualify himself

and his lands for ad valorem tax assessments under TEX. CONST. art. VIII, sec. 1-d.

(5) Appellant would not be entitled to any relief from the judgment of the Supreme Court of Texas even if TEX. CONST. art. VIII, sec. 1-d, as applied by the Supreme Court of Texas, were held by this Supreme Court of the United States to violate the Fourteenth Amendment to the Constitution of the United States, for the reason that such a decision would require a holding invalidating Art. VIII, sec. 1-d entirely, thereby removing any Constitutional basis upon which Appellant could assert a claim for ad valorem tax assessments based upon the agricultural use value of his lands.

ARGUMENT IN SUPPORT OF GROUNDS UPON WHICH THIS APPEAL SHOULD BE DISMISSED OR THE JUDGMENT OF THE SUPREME COURT OF TEXAS AFFIRMED

(1) The precise question presented by Appellant in his Jurisdictional Statement has previously been brought before this Honorable Supreme Court of the United States, and the Court has decided the question adversely to the position taken by the Appellant herein.

Appellant attempts to present to this Court the question

> ". . . may the definition of agricultural land, and the determination of whether or not the owner thereof is a bona fide agriculturalist, be made dependent upon the amount of non-agri-

> cultural income possessor of said land enjoys . . . without being violative or repugnant to the Fourteenth Amendment to the Constitution of the United States." Jurisdictional Statement, p. 4.

This is not an accurate statement of the issue involved in this case. Rather, it could be fairly stated that Appellant's position is that the provision of TEX. CONST. art. VIII, sec. 1-d (a) requiring the agricultural business to be . . ."the primary occupation and source of income of the owner" (of the land) in order to entitle the owner of the lands to preferential ad valorem tax assessments is a violation of the Fourteenth Amendment of the Constitution of the United States.

This precise question has previously been presented to the Supreme Court of the United States. The case of *Stein v. Lewisville Independent School District*, 481 S.W. 2d 436 (Tex.Civ.App.-Fort Worth 1972, writ ref'd n.r.e.) was brought to the Supreme Court on appeal from the Court of Civil Appeals of Texas, Second Supreme Judicial District (Supreme Court of the United States Docket No. 72-1558). Among the questions presented to this Court was a question of whether the requirements of Art. VIII, sec. 1-d necessary to obtain ad valorem tax assessments based upon the agricultural use value of land violated the taxpayer's rights under the Fourteenth Amendment to the Constitution of the United States. The Supreme Court dismissed the appeal for want of jurisdiction, and treating the appeal as a petition for writ of certiorari, denied certiorari. 414 US 948, 38 L.Ed. 2d 203 (1973).

The dismissal of the *Stein* appeal amounts to a

holding on the merits that TEX. CONST. art. VIII, sec. 1-d does not possess the federal constitutional infirmity asserted then by Mrs. Stein and now being asserted by Appellant. *Port Authority Bondholders Protective Committee v. Port of New York Authority*, 270 F.Supp. 947 (D.C.N.Y. 1967), aff'd. 387 F.2d 259; *Wyley v. Warden, Maryland Penitentiary*, 254 F.Supp. 727 (D.C.Md. 1966), aff'd. 372 F.2d 742, cert. denied 389 U.S. 863, 19 L. Ed. 2d 131.

Because the Court has already determined the precise question sought to be reviewed in this appeal, and determined the question adversely to Appellant's position, this appeal should be dismissed for want of jurisdiction or, alternatively, the judgment of the Supreme Court of Texas should be affirmed.

(2) The Supreme Court of the United States does not have jurisdiction of this appeal under 28 U.S.C.A. Sec. 1257 (2), as asserted by Appellant, for the reason that the federal question sought to be reviewed was not expressly passed on by the Supreme Court of Texas.

(3) The Supreme Court of the United States does not have jurisdiction of this appeal under 28 U.S.C.A. Sec. 1257 (2), as asserted by Appellant, for the reason that such appeal does not present a substantial federal question.

In none of the Texas courts was there a question as to the validity of Art. VIII, sec. 1-d of the Texas Constitution on the ground that it is repugnant to the Fourteenth Amendment to the Constitution of the

United States, and consequently, there is no holding in the opinion of the Supreme Court of Texas upholding the validity of Art. VIII, sec. 1-d. On the contrary, Appellant based his entire defense to Appellee's suit for the collection of delinquent taxes on the contention that he was entitled to ad valorem tax assessments based upon the agricultural use value of his lands, as provided by Art. VIII, sec. 1-d, a defense which in no way can be consistent with the claim that the Article violates the Fourteenth Amendment to the Constitution of the United States. He did not attack the validity of the constitutional provision; he instead *relied* upon the provision in his claim for relief against the ad valorem tax assessments being asserted against him.

Rather than being a case involving the validity of the State's constitutional enactment this is a case involving the construction of the constitutional enactment. The opinion of the Supreme Court of Texas, which covers some fourteen pages in the official report restricts itself to a construction of the clause "primary occupation and source of income of the owner" and the effects of such construction on the particular facts of the case. In at least three instances the Supreme Court of Texas expressly approved Appellant's contentions as to the proper construction of the phrase "primary occupation and source of income."

> "We agree with Petitioner Gragg's contention that the "primary occupation and source of income" provision contemplates "gross" rather than "net" income." 539 S.W. 2d, p. 865

> ". . . we agree with Petitioner Gragg that the word "primary" should not be interpreted as requiring the farmer or rancher to receive more than fifty percent of his total gross income from his farming or ranching business." 539 S.W. 2d, p. 868
>
> "Petitioner Gragg contends that only sources of gross income from occupations or business ventures carried on for profit should be compared with gross income from agricultural sources in determining eligibility for the agricultural use designation. This seems to be the clear intent of the agricultural assessment amendment." 539 S.W. 2d, p. 869.

It is apparent that Appellant was not interested in attacking the validity of Art. VIII, sec. 1-d, for he relies upon the article and seeks the ad valorem tax benefits conferred by the article; instead, the thrust of his position in the case has been to obtain a construction of the constitutional enactment most favorable to his position. It is a clearly established principle of law that a case involving the construction of a State enactment does not present a federal question to bring the case within the statutory jurisdiction of the Supreme Court of the United States under 28 U.S.C.A. Sec. 1257 (2). *Grand Gulf R. Co. v. Marshall*, 53 U.S. 165, 13 L.Ed. 938 (1851); *U.S. v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 28 L. Ed. 2d 822 (1971).

> "This court is without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the state." *Quong Ham Wah Co. v. Industrial*

Accident Commission, 255 U.S. 445, p. 448, 65 L. Ed 723 (1921), citing other cases.

This being a case involving nothing more than the construction of a provision of the Texas Constitution, this appeal to the Supreme Court of the United States should be dismissed for want of jurisdiction.

(4) The Supreme Court of the United States does not have jurisdiction of this appeal under 28 U.S.C.A. Sec. 1257 (2), as asserted by Appellant, for the reason that the judgment of the Supreme Court of Texas rests upon an adequate non-federal basis, in that it is based upon the holding that appellant failed to discharge his burden of proof so as to qualify himself and his lands for ad valorem tax assessments under TEX. CONST. Art. VIII, Sec. 1-d.

A cursory reading of the opinion of the Supreme Court of Texas is all that is necessary to ascertain the basis for the decision in this case. The Supreme Court of Texas *did not* affirm the judgments of the District Court and the Court of Civil Appeals by holding the Texas Constitutional provision to be valid as against any contention by Appellant that the provision violated the Fourteenth Amendment to the Constitution of the United States. The decision was not even based upon the construction given Art. VIII, sec. 1-d by the Supreme Court of Texas. The grounds for the decision was very simply a holding that Appellant failed to discharge his burden of proof so as to entitle him to ad valorem tax assessments based upon the agricultural use value of his land. The holding upon

which the decision of the Supreme Court of Texas was based is found in the final two paragraphs of the majority opinion at 539 S.W. 2d, p. 870:

> "Even if the tax assessor had been given all the evidence on this taxpayer's income that was introduced at the trial, the denial of the agricultural use designation would have been justified. . . . he (the taxpayer) admitted that his income reported from his oil operations was "net" rather than the "gross," which he contended for and reported in connection with his agricultural income. There was simply no proof of his gross income from the oil business. Neither was there any proof that the gross receipts from his oil operations or another business venture did not exceed the gross receipts from his agricultural business.
>
> "The record fails to show that the denial of the agricultural use exemption to this taxpayer by the tax assessor was unreasonable, arbitrary or in violation of requirements of the law. The burden fell upon the taxpayer to make that showing, and the trial court and the Court of Civil Appeals have correctly held that the taxpayer failed to do so. See *State v. Whittenburg*, 153 Tex. 205, 265 S.W. 2d 569 (1954); *State v. Houser*, 138 Tex. 28, 156 S.W. 2d 968 (1941)."

From its very inception the Supreme Court of the United States has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Murdock v. Memphis*, 20 Wall. 590, 22 L.Ed. 429 (1875); *Berea College v. Kentucky*, 211 U.S. 45, 53 L.Ed. 81 (1908); *Enterprise Irrig. Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 61 L.Ed. 644 (1917); *Fox Film Corp.*

v. Muller, 296 U.S. 207, 80 L.Ed. 158 (1935). Mr. Justice Jackson stated the rule and the reason for the rule excellently in *Herb v. Pitcairn*, 324 U.S. 117, 89 L.Ed. 789 (1945):

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds . . . The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion." 324 U.S. 117, pp. 125, 126.

That this case was decided on adequate and independent state grounds cannot be disputed. It was not a State constitutional provision repugnant to the Fourteenth Amendment to the Constitution of the United States which prevented Appellant from obtaining ad valorem tax assessments based upon the agricultural use value of his land, nor was Appellant denied such assessments because the Supreme Court of Texas applied TEX. CONST. art. VIII, sec. 1-d in a manner so as to deny him rights guaranteed by the Fourteenth Amendment. The decision of the Supreme

Court of Texas denying him such assessments was solely caused by Appellant's failure to discharge the burden of proof imposed upon him by State law.

It has long been established under Texas law that a taxpayer asserting an exemption from taxation (or a preferential assessment, such as that conferred by Art. VIII, sec. 1-d of the Texas Constitution) bears the burden of proving all facts necessary to entitle him to such exemption. *Markham Hospital v. City of Longview*, 191 S.W.2d 695 (Tex. Civ. App.-Texarkana 1946, writ ref'd); *David Graham Hall Foundation v. Highland Park Independent School District*, 371 S.W. 2d 762 (Tex.Civ.App.-Dallas 1963, writ ref'd n.r.e.); *Methodist Riveroaks Apartments, Inc. v. City of Waco*, 409 S.W.2d 485 (Tex.Civ.App.-Waco 1963, writ ref'd n.r.e., cert denied 389 U.S. 848); *Radio Bible Hour, Inc. v. Hurst-Euless Independent School District*, 341 S.W.2d 467 (Tex.Civ.App.-Fort Worth 1961, writ ref'd n.r.e.); *Hilltop Village, Inc. v. Kerrville Independent School District*, 410 S.W.2d 824 (Tex.Civ.App.-San Antonio 1966, aff'd 426 S.W.2d 943 (Tex.Sup. 1968); *Stein v. Lewisville Independent School District*, supra.

The case of *Stein v. Lewisville Independent School District* was appealed to the Supreme Court of the United States from a decision of the Court of Civil Appeals for the Second Judicial District of Texas denying an agricultural use assessment to the taxpayer. The grounds for the Court of Civil Appeals holding was the same as the grounds for the decision of the Supreme Court of Texas in this case; the tax-

payer failed to discharge her burden of proving her entitlement to such assessment, a matter of State law. As previously stated the Supreme Court of the United States dismissed the appeal and denied writ of certiorari in the *Stein* case. Because the decision of the Supreme Court of Texas in the instant case is based upon the identical grounds as the decision of the Fort Worth Court of Civil Appeals in the *Stein* case Appellant's appeal should be dismissed for want of jurisdiction, or, alternatively, the judgment of the Supreme Court of Texas should be affirmed.

(5) Appellant would not be entitled to any relief from the judgment of the Supreme Court of Texas even if TEX. CONST. Art. VIII, Sec. 1-d, as applied by the Supreme Court of Texas, were held by this Supreme Court of the United States to violate the Fourteenth Amendment to the Constitution of the United States, for the reason that such a decision would require a holding invalidating Art. VIII, Sec. 1-d entirely, thereby removing any constitutional basis upon which Appellant could assert a claim for ad valorem tax assessments based upon the agricultural use value of his lands.

Appellant complains of the action of the Supreme Court of Texas in giving effect to the provision of TEX. CONST. art. VIII, sec. 1-d requiring the agricultural business to be the "primary occupation and source of income of the owner" in order to be entitled to ad valorem tax assessments based upon the agricultural use value of the lands, asserting that such provision violates the Fourteenth Amendment

to the Constitution of the United States. But even if Appellant were correct in his assertion, the practical result of the case would be the same. He would not be entitled to ad valorem tax assessments based on the agricultural use value of his lands. Moreover, his success on this point would destroy his claim for agricultural use value assessments in the future.

TEX. CONST. art. VIII, sec. 1-d was passed by the Texas Legislature in 1965 and adopted by the voters of Texas in 1966. (The amendment, as it was passed by the Texas Legislature in 1965 as H.J.R. 79, is reproduced herein as Appendix B.) The amendment does not contain a severability clause. Without the inclusion of a severability clause no provision of the enactment can be declared invalid without invalidating Art. VIII, sec. 1-d in its entirety.

The net effect of the holding sought by Appellant would be to invalidate the only provision under Texas law entitling him or any other taxpayer to assert the right to ad valorem tax assessments based upon the agricultural use value of his lands. Art. VIII, sec. 1-d was a self enacting constitutional amendment; no enabling statute was necessary, nor was any enacted by the Texas Legislature. Surely Appellant does not wish to destroy the very constitutional provision on which he relies in his campaign to lower his annual ad valorem tax bill. But that would be the exact result if Appellant were successful in asserting this appeal. Such a result would be a great injustice to Appellant, Appellee, every taxing jurisdiction in the State of Texas, and every taxpayer in the State of Texas.

CONCLUSION

The Supreme Court of the United States should dismiss Appellant's appeal from the judgment of the Supreme Court of Texas, or in the alternative, affirm the judgment of the Supreme Court of Texas, for the reason that the identical question presented by Appellant in his appeal has previously been decided adversely to the position of Appellant by the Supreme Court of the United States in the case of *Stein v. Lewisville Independent School District*, supra.

Appellant's appeal should be dismissed, or the judgment of the Supreme Court of Texas affirmed, for the further reason that Appellant's appeal does not come within the appellate jurisdiction of the Supreme Court of the United States under 28 U.S.C.A. Sec. 1257 (2), in that there was no question present in the State court of the validity of TEX. CONST. art. VIII, sec. 1-d, on the grounds of its being repugnant to the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of Texas did not determine the validity of Art. VIII, sec. 1-d; this case was merely one of construction of a State constitutional enactment, a question of a State law and not of Federal law.

Appellant's appeal should be dismissed or the judgment of the Supreme Court of Texas affirmed for the further reason that the decision of the Supreme Court of Texas was based upon a determination of a question of Texas law wholly independent and apart from any determination of a question of Federal law, the grounds for such decision being a holding that Appellant failed to discharge his burden of proof so as to entitle him to ad valorem tax assessments based upon the agricultural use value of his lands.

Finally, the end result of Appellant's position, were he to prevail, would be to totally and completely invalidate the very provision of the Constitution of the State of Texas upon which Appellant relies in his claim for reduced ad valorem tax assessments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the.....day of.....,
1976, a copy of the foregoing Motion to Dismiss or Affirm was served upon counsel for Appellant, Mr. Billy H. Gragg, P. O. Box 678, Palestine, Texas 75801, by mailing same through the United States Mail, postage prepaid.

Eugene J. Dozier

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF TEXAS

No. B-5444

O. L. GRAGG, *Petitioner*

v.

CAYUGA INDEPENDENT SCHOOL DISTRICT, *Respondent*

From Anderson County
Twelfth District

CONCURRING OPINION

The Court here writes upon the meaning of the words which require that the agricultural use — of the land being valued for taxation — be "a business venture for profit, which business is the primary occupation and source of income of the owner." I differ with the opinion in two respects: its holding that *gross* income is the basis of comparison of the landowner's occupations, and its holding that each non-agricultural business is to be compared separately with the landowner's total agricultural business.

The agricultural land assessment provision of the Texas Constitution was originally designed in 1965 by the Legislature to permit the lands of farmers and ranchers to be assessed for ad valorem taxation by ignoring true market value and by valuing it as if agriculture were the highest and best use to which

the land may be put. See King v. Real, 466 S.W.2d 1 (Tex. Civ. App. 1971, writ ref'd n.r.e.). The objectives of that basis of valuation of farm and ranch lands are easily understood and justified. Since 1967 when the taxing officers and boards and the landowners began to apply this Section 1-d, Article 8, of the Constitution, they have faced the problems and restrictions of this requirement that the agricultural use be "a business venture for profit, which business is the primary occupation and source of income of the owner." The Legislature attempted to remove this requirement from the Constitution in 1970,[1] but the proposed change was not adopted in the popular vote.

Before addressing the critical questions of the meaning of "primary . . . source of income" presented in the present case, I must first avow a basic precept: the judicial function is to construe the Constitution and not to rewrite it. The Court is confined to the words and composition of the Constitution as they are — not as we prefer them to be. The task of construing constitutional expressions must first be directed toward deciding — by the consideration of the total language as well as the context of circumstances that aid us in understanding the objectives of that language — an overall rationale of plan and purpose for the constitutional provision. I have several diffi-

[1]S.J.R. 15 of the 61st Legislature would have reduced Section 1-d, Article 8, to the following language:

> "The Legislature shall have the power to provide by law for the establishment of a uniform method of assessment of ranch, farm and forest lands, which shall be based upon the capability of such lands to support the raising of livestock and/or to produce farm and forest crops rather than upon the value of such lands and the crop growing thereon." Acts 61st Leg., R.S. 1970, pg. 3227.

culties with the majority opinion. While it tries to simplify the administration of agricultural land assessment, it actually adds complexity and new puzzles. It seems motivated by the desire to enlarge the number of farmers and ranchers who will be entitled to the agricultural use designation of their land, but this may not be the result — since the predicted effect of basing the determination on gross income seems to me to be no more than the Court's own estimate rather than a product of any evidence of the circumstances of most farmers and ranchers. I should think that the effect of the holding that compares all agricultural income to each separate non-agricultural business will be enjoyed by relatively few landowners. Few of them have so many extra businesses as to profit by this ranking procedure, and those who do operate on a multi-business scale are given the means to acquire an agricultural use designation beyond the intent of the constitutional language. It seems to me that the fundamental flaw of the majority is its failure to base these specific interpretations upon an overall rationale of the constitutional provision and its purpose. I will begin by locating that base as I see it.

The special treatment of Section 1-d was not granted to land investors who might plant a crop or put some livestock on their land. It was not even granted to bona fide ranchers or farmers. Anyone whose ranching operations cover over 22,000 acres of land, and who expends on that operation the time and effort that O. L. Gragg does, is certainly a bona fide rancher. But the Constitution requires more: the

agricultural operation must be the *primary* business — as judged both by commitment of effort and receipt of income.

The taxpayer/landowner's occupations and sources of income to be measured are only those which are business ventures, i.e. occupational endeavors to obtain earnings. The taxpayer/landowner's agricultural business must be *the business* which is "the primary occupation and source of income of the owner" — as compared to his non-agricultural business or trade or professional occupation and as measured by the income to him produced by these occupations. The agricultural use designation is to be given only to those whose primary occupation is agricultural rather than non-agricultural. Not only time and activity is to be weighed but also income. The inquiry as to income is but part of the test of the priority of the landowner's occupation. Which occupation is the most important source of his income — agricultural or otherwise? The landowner is not *primarily* a farmer if he operates a dozen businesses and the ten percent of his time and income allocated and collected from his farm exceeds that allocated to and collected from each of the other endeavors. Net profit — the income to *the landowner* — is the indicator of the priority of the source rather than, for example, gross income from the sale of cattle or gross income from occasional trading in mineral leases. The tax assessor and board of equalization are not directed to a consideration of the taxpayer's income during any certain period of time — since casualties or unusual factors may affect profits briefly without changing the priority of the

occupation to which the taxpayer/landowner looks for his income.

This is my construction of the constitutional provision. I now turn to my two specific points of dispute with the majority.

Gross or Net Income

The word "income" usually refers to gain or accretion or return. See Bowers v. Kerbaugh-Empire Co., 271 U.S. 170, 174 (1926); Humble Oil & Refining Co. v. Calvert, 478 S.W.2d 926 (Tex. 1972); Fullerton v. Central Lincoln People's Utility Dist., 201 P.2d 524 (Ore. 1948); Kennard v. Wiggins, 183 S.W.2d 870 (Mo. 1944); State ex rel. Miller v. State Board of Education, 52 P.2d 141 (Idaho 1935); Stanton v. Zercher, 172 P. 559 (Wash. 1918); In re Niland's Estate, 143 N.W. 170 (Wisc. 1913); Bingham v. Long, 249 Mass. 79, 144 N.E. 77 (1924); Connecticut General Life Ins. Co. v. Eaton, 218 F. 188 (D.C. Conn. 1914); In re Owl Drug Co., 21 F. Supp. 907 (D.C. Nev. 1937); Lyeth v. Hoey, 20 F. Supp. 619 (S.D.N.Y. 1937); In re Phillips' Will, 138 N.J. eq. 96, 46A.2d 796 (Perogative Ct. 1946); Hattiesburg Grocery Co. v. Robertson, 128 Miss. 34, 88 So. 4 (1921); BLACK'S LAW DICTIONARY (4th ed. 1951); Ballantine's Law Dictionary (1969); Oran, Law Dictionary for Non-Lawyers (1975); Webster's Third International Dictionary (1968); and Webster's Seventh New Collegiate Dictionary (1967).

I agree that "income" has in some instances been used to mean the inflow without deduction for ex-

penses. Our question then becomes a determination of the manner of use of the term in Section 1-d, Article 8, of the Texas Constitution. It is not the purpose of this provision to prohibit gain or activity; it is a measurement of priority. Occupations are to be ranked according to their fruits or products or consequences for the person. The *gross* income of an occupation is a midway factor, but it is not the ultimate result of the occupation. Since the purpose of the constitutional provision is to test the priority of the taxpayer/landowner's occupations, gross receipts or revenue is not the index; it is the gain or profit realized by the taxpayer/landowner from those occupations. We are directed by the Constitution to determine the *business* which is the *primary source of income of the owner.* Ranching and oil businesses are expected to have gross as well as net income, but the income of the owner from those businesses is his profit.

If O. L. Gragg were asked the amount of *his income* from his ranch business during 1971, would he be likely to give the total gross sales of livestock, etc., by his ranches ($299,205.84), or would he give the income produced for his benefit ($79,397.67)? Would Farmer Brown, who lost his crop and $50,000 last year, tell you that his income from his farm was $60,000 since the latter figure was the amount of his gross income received from the liquidation of his herd of cattle?

The majority seems to think that the determination of the gross income of a business is a simple matter. However, the gross income of a mercantile business

is ordinarily considered to be the amount of total sales *less the cost of goods sold.* For the sake of simplicity let us assume that a farmer is on the cash basis of accounting; under federal tax regulations his "gross income" requires a computation of his *profits* from the sale of livestock or other items which were purchased by him. 1976 Federal Tax Regulations § 1:61-4. The full sales prices and receipts are not his "gross income"; the cost of the purchased livestock must first be deducted. I suggest that the determination of whether the taxpayer/landowner is primarily engaged in agriculture will not entail nearly so many difficult accounting problems as will the rule announced by the majority which requires a comparison of the gross income of each and every business in which the taxpayer/landowner is occupied. If the business is organized as a corporation, limited partnership or business partnership, there will be questions of how to allocate gross income to the taxpayer/landowner. Will it be possible to reduce the "gross income" by incorporating the business or by taking no money except in the form of wages or dividends?

I can find no rational purpose in requiring a comparison of the sources of gross income. If I understand the writing of the majority at this point, the thought is simply that more farmers and ranchers will be entitled to the agricultural use designation if only gross agricultural income is considered. I do not know that this is true, but if it is, I respectfully request that this reasoning be compared to the time honored rule that the courts will construe constitutional and statu-

tory exemptions strictly. River Oaks Garden Club v. City of Houston, 370 S.W.2d 851 (Tex. 1963); Morris v. Loan Star Chapt. No. 6, Royal Arch Masons, 68 Tex. 698, 5 S.W. 519 (1887). Whether or not the agricultural use designation must be termed an "exemption" from taxation, it is favored treatment and the constitutional amendment should not be liberally construed. See Driscoll Foundation v. Nueces County, 445 S.W.2d 1, 5 (Tex. Civ. App. 1969, writ ref'd n.r.e., 450 S.W.2d 320, 1970).

Meaning of "Primary" Business

The majority is most liberal in allowing the agricultural use designation to the landowner whose agricultural business produces more income than each of his other businesses or occupations — however many the non-agricultural occupations may be and despite the fact that the total nonagricultural income and time requirements may greatly exceed those of the agricultural business. Our first step in this analysis is to decide whether we must lump the agricultural operations together. Why not permit the tax assessor to rank each farm or ranch separately? O. L. Gragg, for example, operates several different ranches. Suppose the taxpayer and his wife operate a field where they grow vegetables, while he and his son have a large cotton farm, he and another son have some chicken houses, and he and a brother operate a large West Texas ranch. Are these separate businesses under the Constitution? I think not. The Constitution provides:

> "Agricultural use" means the raising of livestock or growing of crops, fruit, flowers, and other products of the soil under natural conditions as a business venture for profit, *which business is* . . .

Any and all "agricultural use" is the one business that must be the taxpayer/landowner's primary occupation.

The next step: "primary." There is no problem as to the meaning of the word. The question is primary *as to what?* I conclude that the objective, as indicated by putting agricultural uses together, is to determine whether agriculture is the primary occupation — as compared to non-agriculture. What would be the purpose of requiring that the farm be more significant than each of a dozen other ventures? This requirement of the Constitution is obviously restrictive. It was no casual bit of drafting; it was intended to prevent the owners of some farms and ranches from obtaining this advantageous assessment of their lands. The comparison that counts—the restriction that ensures that those who obtain the agricultural use designation truly deserve it—is the requirement that the taxpayer/landowner be primarily in the business of agriculture, whatever else (combined) he may do as an occupation.

If the rule of the majority is to apply, how shall we divide the non-agricultural occupations for purposes of comparison? Do oil and gas operations go together, or is Gragg Drilling Company one entity and Carter-Gragg Oil Company another, etc.? At some point the

courts will have to write the rules for arranging these non-agricultural incomes. This could be avoided by following what seems to me to be the plain intent of the Constitution itself. The majority seems to be looking in the direction of that plain intent when it says that the denial of Gragg's agricultural use designation was justified and cites the evidence that his gross agricultural income during the three calendar years of 1970, 1971 and 1972 (together) was approximately $1 million as compared to $1.5 million income from all other sources. I agree that this proof gets to the heart of the case and requires the affirmance of the judgments of the lower courts. The non-agricultural income was all profit or gain, and the gain to Gragg from the agricultural business was necessarily much less than the $1 million (actually about $320,000).

The argument for separation of the non-agricultural income would seem to be that the Constitution points to each "source of income" and this requires that the taxpayer/landowner receive greater income from agriculture than from any other individual *source*. Gragg Drilling Company and Carter-Gragg Oil Company are two different sources of income, and their income would then be considered separately rather than added together. Gragg owns several different oil properties, and it seems that the production from each of these should be considered as income from a separate source. I conclude that whereas O. L. Gragg may have failed to make the proof required to obtain 1970, 1971 or 1972 agricultural use designations, the record and briefs in this case indicate that

he may come within the new rules and be able to make the proof to qualify in future years.

Thomas M. Reavley
Associate Justice

Associate Justices McGee and Johnson join in this Concurring Opinion.

OPINION DELIVERED: June 16, 1976.

APPENDIX B

Proposed Constitutional Amendment — Agricultural Lands — Taxation

H. J. R. No. 79

Proposing an amendment to Article VIII, Constitution of the State of Texas, by adding Section 1-d to provide that all land owned by natural persons designated for agricultural use shall be assessed for all tax purposes on the consideration of only those factors relative to such agricultural use.

Be it resolved by the Legislature of the State of Texas:

Section 1. That Article VIII, Constitution of the State of Texas, be amended by adding Section 1-d to read as follows:

"Section 1-d. (a) All land owned by natural persons which is designated for agricultural use in accordance with the provisions of this Section shall be assessed for all tax purposes on the consideration of only those factors relative to such agricultural use. 'Agricultural use' means the raising of livestock of growing of crops, fruit, flowers, and other products of the soil under natural conditions as a business venture for profit, which business is the primary occupation and source of income of the owner.

"(b) For each assessment year the owner wishes to qualify his land under provisions of this Section as

designated for agricultural use he shall file with the local tax assesor a sworn statement in writing describing the use to which the land is devoted.

"(c) Upon receipt of the sworn statement in writing the local tax assessor shall determine whether or not such land qualifies for the designation as to agricultural use as defined herein and in the event it so qualifies he shall designate such land as being for agricultural use and assess the land accordingly.

"(d) Such local tax assessor may inspect the land and require such evidence of use and source of income as may be necessary or useful in determining whether or not the agricultural use provision of this article applies.

"(e) No land may qualify for the designation provided for in this Act unless for at least three (3) successive years immediately preceding the assessment date the land has been devoted exclusively for agricultural use, or unless ths land has been continuously developed for agriculture during such time.

"(f) Each year during which the land is designated for agricultural use, the local tax assessor shall note on his records the valuation which would have been made had the land not qualified for such designation under this Section. If designated land is subsequently diverted to a purpose other than that of agricultural use, or is sold, the land shall be subject to an additional tax. The additional tax shall equal the difference between taxes paid or payable, hereunder, and the amount of tax payable for the preceding three years had the land been otherwise assessed. Until paid, there shall be a lien for additional taxes and

interest on land assessed under the provisions of this Section.

"(g) The valuation and assessment of any minerals or subsurface rights to minerals shall not come within the provisions of this Section."

Sec. 2. The foregoing Constitutional Amendment shall be submitted to a vote of the qualified electors of this State at an election to be held on the first Tuesday after the first Monday in November, 1966, at which election all ballots shall have printed on them the following:

"FOR the Constitutional Amendment to provide that all land owned by natural persons designated for agricultural use shall be assessed for all tax purposes on the consideration of only those factors relative to such agricultural use.

"AGAINST the Constitutional Amendment to provide that all land owned by natural persons designated for agricultural use shall be assessed for all tax purposes on the consideration of only those factors relative to such agricultural use."

Sec. 3. The Governor of the State of Texas shall issue the necessary proclamation for the election and this Amendment shall be published in the manner and for the length of time as required by the constitution and laws of this state.

Adopted by the House on April 27, 1965: Yeas 102, Nays 32; passed by the Senate on May 10, 1965: Yeas 21, Nays 9.

Signed by the Governor May 21, 1965.

Supreme Court, U. S.
FILED
NOV 10 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-469

O. L. GRAGG, *Appellant*

v.

CAYUGA INDEPENDENT SCHOOL DISTRICT,
Appellee

On Appeal From The Supreme Court Of Texas

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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SUBJECT INDEX

	Page
I. MATTERS IN REPLY	2
A. The reasons for not finding jurisdiction in the Stein case are clearly not applicable to the instant case.	2
B. Matters in reply to points two and three of appellee.	4
C. In reply to proposition four of appellee, appellant says that the opinion of the Texas Supreme Court cannot be sustained on adequate non-federal grounds.	5
D. In reply to point five of appellee.	5
II. SUPPLEMENTAL MATTERS	7
CONCLUSION	7
APPENDIX "A"—Jurisdictional Statement in the United States Supreme Court—Stein v. Lewisville Independent School District, 481 S.W.2d 436 (Tex. Civ. App.—Fort Worth 1972, writ ref'd. n.r.e.), cert. denied 414 U.S. 948, 38 L.Ed.2d 203 (1973)	9
APPENDIX "B"—Order of the Supreme Court of Texas—Temporary Stay of Mandate in O. L. Gragg v. Cayuga Independent School District	20

LIST OF AUTHORITIES

CASES

	Page
Stein v. Lewisville Independent School District, 481 S.W.2d 436 (Tex. Civ. App.—Fort Worth 1972, writ ref'd. n.r.e.), cert. denied 414 U.S. 948, 38 L.Ed.2d 203 (1973)	2, 3, 4, 7
United Fuel Gas Company v. Hallanan, 257 U.S. 277, 66 L.Ed. 234 (1921)	4, 5

UNITED STATES CONSTITUTION

Fourteenth Amendment	4

TEXAS CONSTITUTION

Article VIII, Section 1-d	2, 3, 6

IN THE

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OCTOBER TERM, 1976

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O. L. GRAGG, *Appellant*

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CAYUGA INDEPENDENT SCHOOL DISTRICT,
Appellee

On Appeal From The Supreme Court Of Texas

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

Now comes O. L. Gragg, Appellant in the above numbered and entitled cause, and files this brief in opposition to the motion of appellee to dismiss or affirm judgment of the Supreme Court of Texas, and in supplementation of the Jurisdictional Statement originally tendered by Appellant, and respectfully shows the Court the following:

I. MATTERS IN REPLY

A. The reasons for not finding jurisdiction in the Stein case are clearly not applicable to the instant case.

The reliance by appellee on *Stein v. Lewisville Independent School District,* 481 S.W.2d 436 (Tex.Civ.App. —Fort Worth 1972, writ ref'd. n.r.e.), cert. denied 414 U.S. 948, 38 L.Ed.2d 203 (1973) is not well taken. The Texas Appellate Court found three marked deficiencies in the proof offered in the *Stein* case. The court notes at page 440, "the undisputed evidence showed that the property taxed was not used by them for agricultural purposes, and also that any use of the property for agricultural purposes by others was not the primary occupation of, nor source of income for, the defendants or any of them." The opinion of the Texas Court of Civil Appeals does not suggest that a claim was ever made that art. VIII, §1-d of the Texas Constitution was repugnant to any part of the Constitution of the United States. It is immediately apparent that a finding of non-agricultural use would of itself constitute conclusive grounds that the decision of the Texas Court could be sustained on the basis of valid state law alone, and therefore the requisite element for appeal to this Honorable Tribunal would not exist. This coupled with the fact that there is no indication that appellant made any claim that art. VIII, §1-d was in any way repugnant to part of the Constitution of the United States clearly distinguishes *Stein* from the claim of this appellant.

The frequent reference by the Texas Court in the *Stein* case of the forbearance and patience shown to Mrs. Stein, who, though not a lawyer, represented herself in

a difficult and technical area led this appellant to scrutinize aspects of the case that admittedly would not normally be relevant. As a result of his investigation such marked deficiencies were discovered that appellant feels compelled to direct the attention of the court thereto.

The matter to which appellant refers is the Jurisdictional Statement of appellant in the *Stein* case. The argument in such case is so strikingly irrelevant that appellant has taken the liberty of reproducing it in Appendix "A". In the interest of keeping this reply short, no other part of said Jurisdictional Statement has been reproduced, but appellant would note that in the index Mrs. Stein refers to her argument under the caption "List of Authorities," "Judicial Notice of Communism Running Rampant Today, pages 1 thru 11". Mrs. Stein does not make an actual claim that art. VIII, §1-d is repugnant to any part of the Constitution of the United States, rather she seems to make some vague contention that our federal constitution gives her some type of inherent right of appeal. It is little wonder that the response to her statement by appellee in said case utilized less than two and one half pages.

This appellant applauds the right of access to the courts by all citizens who choose to represent themselves, but obviously the mischief that can be wrought from such representation is apparent were the court to accept the contention by appellee that *Stein* had decided the issue of this case, without affording appellant independent review of his Jurisdictional Statement unfettered by the *Stein* decision.

The distinctions between *Stein* and the instant case are apparent from the opinion of the Texas Court of Civil Appeals, but when supplemented by the background ma-

terial of said case, *Stein* is reduced to complete immateriality.

B. Matters in reply to points two and three of appellee.

Appellant is in disagreement with appellee that the Supreme Court of Texas did not pass on the federal question. In the original Jurisdictional Statement of appellant at C-8 the court expressly stated, "so long as it is thus interpreted, we do not believe the classification will encounter the possibly constitutional objections conditionally raised by petitioner Gragg." It is submitted that this is an express holding in favor of constitutionality.

In any event, the court of necessity had to pass on the constitutionality of the act as applied in order to reach the decision rendered. It is the claim of appellant that to apply the agricultural use provision in a way so as to make an income balancing test requisite to eligibility renders such article repugnant to the Fourteenth Amendment to the Constitution of the United States, for reasons set forth in his Jurisdictional Statement. The utilization of such test and the premise of appellant are mutually exclusive. In upholding the validity of the article the court of necessity held against the contention of appellant, and in favor of the constitutionality of the article i.e., the court did not accede to the position of appellant that an income balancing test was improper. Thus even without the express holding mentioned above the decision constitutes a holding on the constitutional issue raised by appellant. *United Fuel Gas Company v. Hallanan,* 257 U.S. 277, 66 L.Ed. 234 (1921).

In regard to the contention by appellee that the appeal presents no substantial federal question, appellant feels

that the reasons advanced in his Jurisdictional Statement are sufficient to establish the contrary of the proposition. A restatement of such material would merely be redundant and thus no further comments on this point are deemed necessary.

C. In reply to proposition four of appellee, appellant says that the opinion of the Texas Supreme Court cannot be sustained on adequate non-federal grounds.

The deficiency of proof attributed to appellant is that he failed to prove his agricultural income was greater than his non-agricultural income. It is the validity of this very requirement that is here at issue. If the court accepts the proposition of appellant that an income balancing test imposes an arbitrary classification, then the alleged deficiency of proof becomes moot.

D. In reply to point five of appellee, appellant states:

"A statute may be invalid as to one set of facts, and yet valid as applied to another." *United Fuel Gas Company, supra.* It is quite apparent that that portion of the agricultural community which has agricultural income in excess of non-agricultural income is not faced with the problem of the 1/3 to 2/3 of the community which does have an excess of non-agricultural receipts. The enactment is clearly valid to the former.

As appellant pointed out in his Jurisdictional Statement, some thirty-two states have agricultural use enactments. All are designed to alleviate the economic pressures being experienced by agriculturists. The enactment clause by which the Texas amendment was proposed clearly illustrates

that Texas is no exception, "Proposing an amendment to Article VIII, Constitution of the State of Texas, by adding Section 1-d to provide that all land owned by natural persons designated for agricultural use shall be assessed for all tax purposes on the consideration of only those factors relative to such agricultural use." Appellee's Motion to Dismiss, Appendix "B".

The purpose of the enactment is clear. It is the agricultural community as a whole to whom relief is proffered. There is not the slightest suggestion that relief is intended for a specific segment thereof, as would be the case were the contention of appellee adopted.[1] The capricious nature of seeking a diachotomy based on the criteria for which appellee contends has already been demonstrated in the Jurisdictional Statement.

The holding that the Texas agricultural enactment is repugnant to the Constitution of the United States when applied so as to capriciously exclude from its scope what is admitedly agricultural land should not invalidate the entire enactment. Such a holding would not render the enactment in the least inconsistent with the enacting clause as stated by the state legislature, or do violence to the premise upon which all such enactments, including that of Texas, appear predicated. Furthermore, the injustices envisaged by appellee simply do not exist, as the experience of other states illustrates. A number of other states deem very nominal criteria sufficient for determining what is and is not agricultural land.[2] None apply unusual, unnatural, capricious, or unreasonable standards as is done in the instant case.

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1. See Jurisdictional Statement, at 14-17.

2. Some specific examples of the criteria utilized by other states are set forth in the Jurisdictional Statement, at 12-13.

II. SUPPLEMENTAL MATTERS

Since the docketing of the Jurisdictional Statement offered by appellant certain matters have happened affecting the stay of mandate to which the attention of the court should be directed. In the Jurisdictional Statement it was pointed out that the existing stay and supersedeas had been extended by the Supreme Court of Texas until November 1, 1976. A copy of such order may be found at D-5-1 of said Jurisdictional Statement.

On the 13th day of October, 1976, appellant filed a motion with the State Supreme Court requesting a continuance of said stay, "Pending a Final Judgment by the Supreme Court of the United States," or in the alternative asserting his right to file a new supersedeas pending such final disposition.

The motion of appellant was granted in part and denied in part, said order of the court being included herein as Appendix "B". The stay was granted, but only for a period of sixty days from November 1, 1976. Specific attention is directed to the concluding portion of said order of the Supreme Court of Texas which reads, "It is further ordered that the mandate shall issue at the expiration of said sixty days unless the U. S. Supreme Court, or a justice thereof, shall order that it be stayed."

CONCLUSION

It is clear that the *Stein* case did not pass upon precisely the same question as is at issue here, and indeed, the opinion of the Court of Civil Appeals makes it abundantly clear that sufficient non-federal grounds existed not present in the instant case to make proper a finding

that this Honorable Tribunal had no jurisdiction. The background of said case emphasizes its irrelevance to the instant cause.

Appellant continues in his belief that he has established that the central question is whether or not an income balancing test speaks to the purpose of the enactment. It is to be noted that appellee does not challenge such standard as a proper criterion, and appellant submits that appellee has been unsuccessful in his attempt to circumvent said standard.

It is clear that a recognition of the impediment urged by appellant would not result in invalidating such enactment in its entirety.

Appellant accordingly respectfully submits that he has established that a substantial federal question exists, and that the matter should be set for plenary consideration.

Respectfully submitted,

BILLY H. GRAGG
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Area Code 214/729-2197

Of Counsel:

BOB R. REEVES
P. O. Box 93
Palestine, Texas 75801

November, 1976

APPENDIX "A"

In The
SUPREME COURT OF THE UNITED STATES
. . . . . Term, ...

No. . . . . .

BETTY M. STEIN, Independent and as Administratrix of the Estate of Barbara Dian Meyer, nee Barbara Dian Minyard and Bob Minyard,
Petitioner-Appellant,

v.

LEWISVILLE INDEPENDENT SCHOOL DISTRICT and CITY OF LEWISVILLE, Intervenor,
Respondent-Appellee.

On Appeal From the Supreme Court of the State of Texas

JURISDICTIONAL STATEMENT

To The Honorable Justices:

I.

Comes now petitioner, Betty M. Stein, with power of attorney for Barbara Dian Minyard Meyer, and Bob Lee Minyard, petitioner's children, and appeals to the Supreme Court of the United States from a refusal for writ of error by the Texas Supreme Court, which court confirmed

the opinion by the Court of Civil Appeals For the Second Supreme Judicial District, Ft. Worth, Texas, Tarrant County. Said Court of Civil Appeals ordered foreclosure of petitioner's farmland and a reversal of the amount awarded for attorneys fees to be heard by a jury and in an inpersonam action only.

II.

The 158th District Court of Denton County, with Judge Temple Driver of Wichita Falls, Texas District Court sitting for Judge Bob Scofield, rendered a judgment of foreclosure upon petitioner's farmland in the amount of $4,456.09 for the Lewisville Independent School District and $2,448.46 for the City of Lewisville, and 10% attorneys fees for each attorney to be added to each award with interest to date of payment on September 23, 1971.

III.

Petitioner is appealing on the grounds of a complete failure of due process which due process of the law is guaranteed to each citizen of the United States under the Constitution of the United States, Amendment Article XIV, and Amendment Article V, and for the infringement thereof, under the laws of the United States, one has a right to appeal to the United States Supreme Court.

Due process, petitioner contends, means the right to appeal to the United States Supreme Court the infringement thereof and the right to be heard fully by a competent jury or judge; because petitioner's jury was snatched from her on a motion for an instructed verdict, which motion itself petitioner contends is repugnant to the due

process clause and equal protection clause of the United States Constitution because said motion in the hands of the unscrupulous, can, is, and was abused, in petitioner's delinquent tax case concerning 48.45 acres of farmland.

IV.

In May, 1968, the Lewisville Independent School District joined in a case brought by the State of Texas, State and County Tax Collector for the collection of delinquent taxes, school taxes, and state and county taxes. Petitioner was shocked that the state of Texas had sued her because she had always tried to pay the state and county taxes because she did not think they were excessive and the amount was not too large for her to pay on the farmland; therefore she immediately found out which years were due and the collector went back about five years and found a year or two unpaid; but petitioner had never received a notice that there were any unpaid state and county taxes and she immediately wrote them to this effect and went in and paid to state and county tax-collector the amount he said was due; but, petitioner had not paid in the school taxes because the tax-collector had become unreasonable in his demands of more money than the farm was making by farming vicariously through lessees for many, many years. Since she had been left a widow with two children, one of them five months old in 1946, and she was afraid to live on the farm alone with the small children; therefore she lived in an apartment in Dallas, Texas and farmed vicariously through others. Petitioner since 1946 to the present date of February 1972 has never received more than $50.00 per month for the leasing of the farmland which was a total of $600.00 per year. But the school district began to jump

the taxes beyond the "reasonable cash market value, not to be exceeded limitation placed thereon by Article 8, Section 20 of the Texas Constitution as to delinquent taxes. The School District and the City of Lewisville (farmland taken into the city in 1964) began a wrongful scheme of valuation by using as their tests what is known as condemnation theory or tests for value such as "highest and best value, willing seller and willing buyer" based upon potential uses of petitioner's farmland and not upon the present use which was farmland bringing only $600.00 per year. Petitioner contended that the farmland might have great potential worth but such potential worth or value did not increase her meager income a fraction; therefore she simply could not and did not have the necessary funds they demanded and finally brought suit against her for collection thereof. The fact that petitioner did not have the excessive taxes did not make her hands dirty or show a lack of good faith and the law gave her a right to fight in the courts, excessive taxes.

V.

After the State of Texas withdrew from the tax suit they brought in 1968, the Lewisville Independent School District found themselves without an attorney to get the case dismissed and to refile on petitioner. But, alas, on November 5, 1969 a new District Court was created in Denton County, Denton Texas with a Judge Bob Scofield presiding. A list of cases were transferred to the new 158th District Court from the 16th District Court in the Denton County Court House and one of the cases was the remaining portion of the original tax case originally brought by the State of Texas. The remaining portion, being, of course, the portion intervened into by The

Lewisville Independent School District; but, there was no attorney to get it dismissed because the state's attorney, Bill Harte of Eastland no longer represented the school district; therefore someone had to be paid to get said case dismissed so the school district could refile, and alas, the bright young judge, Bob Scofield, and petitioners former attorney who represented her in the original suit, got together and elected dumb-dumb Stein (petitioner) to pay for it in this manner. Royce Coleman, the attorney petitioner hired, wrote petitioner a letter stating that he had secured a judgment of dismissal *with prejudice,* and that, of course, would make her taxes null and void for the years 1954 through 1968 and that for this fine little piece of work, that petitioner owed him $50.00 and would she please send it to him. Of course, she sent it to him, thinking he had secured her a good and valid judgment. But, alas, in May 1971, the school District sued her for the years 1954 through partially 1971 for delinquent taxes with interest and penalty, and petitioner, not having any money with which to hire an attorney and being in a state of shock jumped into the suit and represented herself. Over tweny-years ago, petitioner had gone to law school and had taken the Texas Bar examination, but she had forgotten almost everything and she did not know very much because she only made a 72 on the bar examination and therefore did not get a license to practice in the state of Texas. But, nevertheless, there was absolutely nothing else for her to do but to represent herself and children.

VI.

Of course, on her motion for summary judgment, she contended she had a good and valid judgment granted on August 10, 1970; but during this pre-trial time on August

18, 1971, and shortly before the trial which had been set for September 21, 1971; notice for the first time came to her that Judge Bob Scofield had entered a modification of his judgment of dismissal with prejudice for lack of prosecution and he struck out the "with prejudice" wording on February 3, 1971, six months after term time and appeal time and such action upset petitioner terribly and, of course, she objected, but to no avail. And some weeks ago, she realized that August 10, 1970 judgment was void, because she found sometime earlier that the portion of the case that had not been dismissed had been transferred to the 158th District Court and he had worked out a little scheme to issue it out of the 16th District Court but with his signature thereon, and he should have issued the judgment of dismissal out of the 158th the court to which it had been transferred, but he knew how to get the dismissal paid for and still allow the school district to return and bring a new suit. Judge Bob Scofield's remark to petitioner in his office before others sometime before the new school tax case came on to be heard that if she did not pay her taxes, then he would have to pay more, now, at this late date, was the basis of all of the sadism, brutality, lack of dignity, and lack of honesty, that he could muster for petitioner during the days of September 21, 1971 through December 8, 1972 and some days thereafter.

VII.

Petitioner was screamed at, harassed, insulted, embarrassed, in front of others, belittled, ridiculed, her statement of fact was changed, rearranged, altered, and material taken out after her statement of facts was confiscated by Judge Bob Scofield after her bills of exceptions were

combed and examined. The transcript reflected Judge Temple Driver as having heard the case in the 16th District Court when in fact he heard and tried it in the 158th District Court sitting for Judge Bob Scofield. The wrong term time was given in the transcript, the wrong address of appellant petitioner was put on said transcript. Judge Bob Scofield screamed at her that she could not question the added 10% attorneys fees on her appeal, but she got that part reversed and he took away her tape recorder at one of the hearings concerning the untrue statement of facts.

VIII.

Judge Temple Driver in his addendum to the judgment stated that the reasonable market value of the farm land was four thousand dollars per acre, which would be approximately $192,000, and then he ordered a foreclosure on the entire two tracts of farmland for approximately $7,594.99 including 10% attorneys fees when our Texas Constitution states clearly and with the idea in mind to protect citizens from the unscrupulous "any means to and end people" that a foreclosure may be only to a "sufficient" amount of property, farmland, to satisfy award, Article 8, Section 13, and Texas Statutes point out specifically that amounts must be cut out in squares starting from the east corner if possible for only sufficient amounts to satisfy the award in a judgment.

IX.

Therefore, one can easily see a conspiracy existed to attempt to obtain petitioner's entire farm at an auction sale; but, petitioner borrowed enough money to put up a supersedeas bond after being advised to do so by a

young attorney. But, the supersedeas bond only gave the unscrupulous a place to hide because they argued to the court of civil appeals and to the Texas Supreme Court that they were looking to the bonding company for payment and not any longer to the farmland; and petitioner has had to borrow at a great interest enough money to cover the judgment in the event the United States Supreme Court should rule against her and she will have to be in debt twenty years or more and if a depression should come, she might lose her mortgaged property. She does not have now sufficient monies to pay almost $1,000.00 per year for the city, school, state and county taxes on her four-apartment building due to vacancies and extremely high cost of maintenance let alone another almost $1,000.00 per year for the city and school taxes for the farmland when she only gets $600.00 per year from it. And furthermore, she is entitled to make a profit from a business venture and she can make no profit from $600.00 per year from the farmland if the ad valorem taxes are almost $1,000.00. The state and county taxes are just $22.80 on the farmland because she homesteads the farmland and the state and county allow her the agricultural exemption because the farmland has been such for over 100 years and petitioner has had the farm for over twenty-seven years and leased it and it has always been used as farmland by her. Also, petitioner has a U. S. Constitutional protection against retroactive laws and the agricultural exemption law went into effect only about 1965 after petitioner had long been established at the farmland and the U. S. Constitutional law that a persons property, life, or liberty cannot be taken without due process, petitioner believes will protect her against the "any means to and end personalities" in power in the Denton County Court House.

X.

Petitioner has always been ready to borrow enough money to pay her share of fair taxes, but she has fought and will continue to fight excessive, abusive, and wrongfully evaluated taxes which work undue hardship on citizens with limited incomes. Also, she rendered her farmland since 1968, but the Plaintiff's in the tax suit would not acknowledge them or use them as a basis for their taxes due but instead used their abusive assessments based upon condemnation theories and tests and not upon the test set out in our Texas Constitution. The wrongful scheme of valuation is being used on all of the citizens and many are being forced to sell their farmland and homes, etc.

XI.

Petitioner's pray that the U. S. Supreme Court will take jurisdiction of her appeal and halt the unscrupulous "any means to and end personalities" and allow her to make a profit on her farmland. And, to also investigate why the Texas Supreme Court, Chief Justice, The Honorable Joe Greenhill or the Clerk of said court has remained silent as to petitioner-appellant's missing "Newly Discovered Evidence paper which was attached to the Auditor's Report for 1972 but, was not returned to appellant but had been detached therefrom.

XII.

Petitioner has detected that communism is also running rampant in many government (local) agencies here in Dallas County.

XIII.

The question No. 1. Herein is "Whether or not the wrongful scheme of valuation as used by the tax collectors, "highest and best value" and "willing seller and willing buyer" are the tests set out by the Texas Constitution which states in Article 8 Section 20, that the only test to be used by the tax collectors and boards of equalization is the fair *cash* market value test, which is never to be exceeded?

The question No. 2. Herein is whether or not the entire farmland should have been foreclosed upon for a proportionately smaller judgment award with disregard to the Texas Constitution Article 8, Section 13?

The question No. 3. Why the silence on said missing "Newly Discovered Evidence" paper? This paper was attached to the "Auditors' Report sent to the Supreme Court of Texas by petitioner upon receiving the "Auditors' Report."

The question No. 4. Herein is whether or not the judge, of the 158th District Court, Bob Scofield acted with dignity and restraint becoming a district court judge?

Notice of Appeal was given to the Texas Supreme Court shortly before the Motion for Rehearing was overruled on November 22, 1972, as well as to the Court of Civil Appeals a few days later, and also to the District Court of Denton County, Texas on December 13, 1972. Also, shortly before December 13, 1972, notice was given to the Clerk of U.S.

XIV.

Petitioner also makes a motion that Supreme Court Justices order up the entire record in order to see for

themselves the whole truth and change in the style of the case by Judge Massey. The foreclosure judgment was not against R. L. Minyard estate as Judge Massey stated, but against Betty M. Stein as Administratrix of Estate of Barbara Dian Minyard Meyer and Bob Minyard when said property is still in the name of R. L. Minyard and recorded as such and not in the name of any of defendants on the records in Denton County, Texas.

/s/ BETTY M. STEIN

Betty M. Stein,

6600 Westchester Dr.
Apt. 1
Dallas County, Texas 75205

Pro se and with Power of Attorney for Children.

Sworn to and subscribed to before me and known to me personally, and that all of the above statements are true and correct to the best of her knowledge, on this the 15th day of February, 1973.

(illegible sig.)

Notary

My Commission expires on the 30th day of June, 1973.

APPENDIX "B"

ORDER OF THE COURT

NO. B-5444

O. L. GRAGG, Petitioner	§	
	§	From
v.	§	
	§	Anderson County
CAYUGA INDEPENDENT SCHOOL DISTRICT,	§	
	§	Twelfth District
Respondent	§	

Motion of O. L. Gragg for extension of stay of mandate and execution and enforcement of judgment filed on October 13, 1976, having been duly considered by the Court, it is ordered that said motion be, and hereby is, granted.

It is, therefore, ordered that the Clerk of this Court withhold issuance of mandate in this cause for a period of sixty days from November 1, 1976, and that execution and enforcement of the judgment entered herein be stayed for such period.

It is further ordered that the mandate shall issue at the expiration of said sixty days unless the U.S. Supreme Court, or a justice thereof, shall order that it be stayed.

By the Court

In Chambers

October 26, 1976

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above is a true and correct copy of order of the Supreme Court of Texas with reference to staying of mandate in the case of O. L. GRAGG v. CAYUGA INDEPENDENT SCHOOL DISTRICT, No. B-5444, from Anderson County, Twelfth District, as such order appears in the minutes of said Court under the date of October 26, 1976.

IN TESTIMONY WHEREOF, Witness my hand and seal of the Supreme Court of Texas, at the City of Austin, on this 26th day of October, 1976.

/s/ GARSON R. JACKSON
Garson R. Jackson, Clerk

(SEAL)